

Vol. IV
TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1926

No. 249

BEECH-NUT PACKING COMPANY, PETITIONER,

vs.

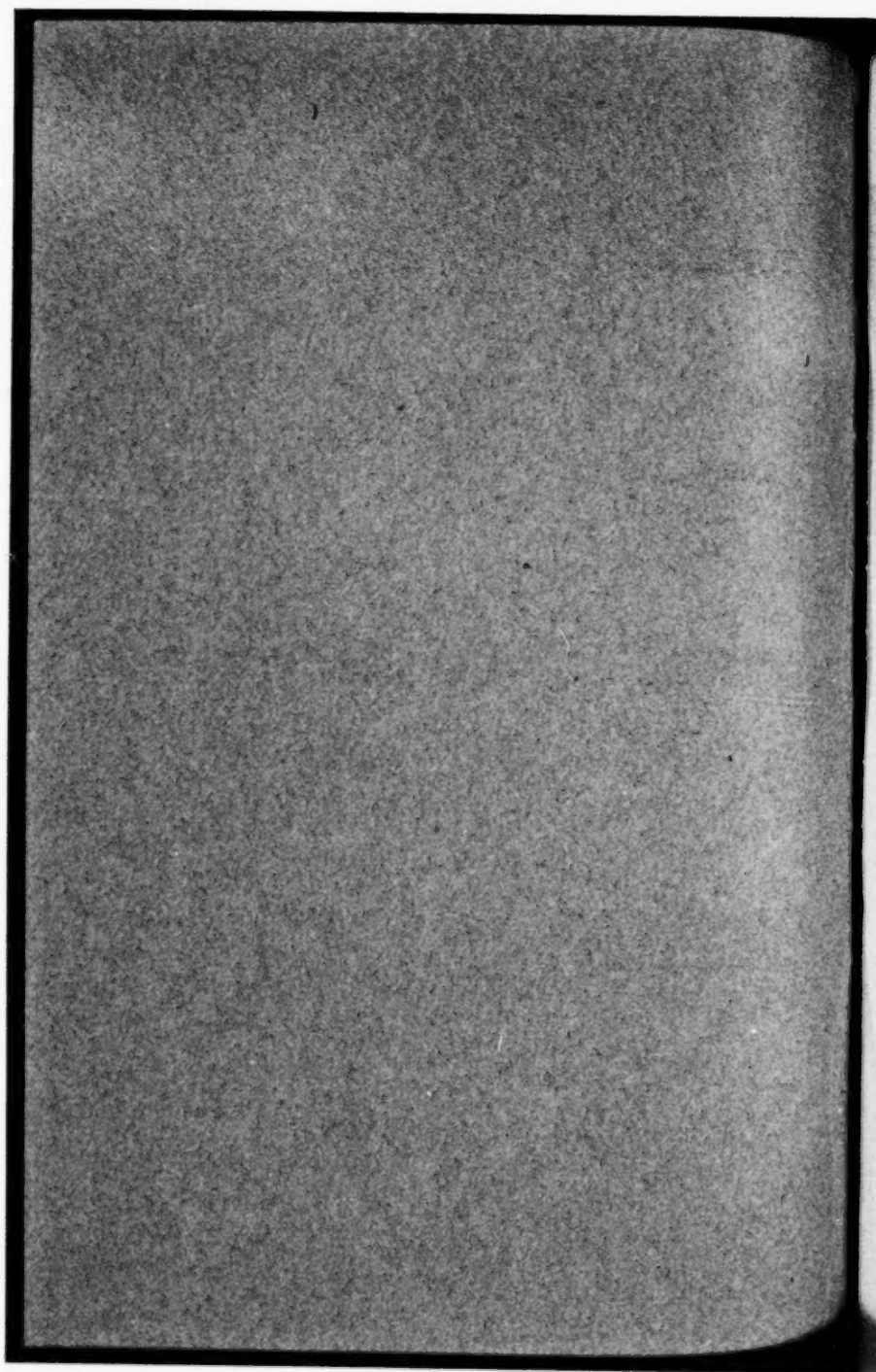
P. LORILLARD COMPANY

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE THIRD CIRCUIT**

PETITION FOR CERTIORARI FILED DECEMBER 2, 1926

CERTIORARI GRANTED JANUARY 11, 1927

(81,557)



(31,557)

SUPREME COURT OF THE UNITED STATES

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In the United States Patent Office

P. LORILLARD COMPANY	}	Trade-Mark Oppo- sition No. 2805.
vs.		
BEECH-NUT PACKING COMPANY.		

Beech-Nut.

Answer.

TO THE HON. COMMISSIONER OF PATENTS:

The Answer of Beech-Nut Packing Company to the Notice of Opposition of P. Lorillard Company, Opposition No. 2805.

This applicant, now and at all times saving and reserving unto itself all benefit and advantage of exception to the many errors, uncertainties, imperfections and insufficiencies in the Notice of Opposition contained for answer thereto, or to so much and such parts thereof as this applicant is advised it is material or necessary for it to make answer to, answering says:

First: This applicant admits the allegations in the first paragraph of the Notice of Opposition.

Second: This applicant, further answering, denies that for many years past, to-wit, since 1899, or prior thereto, the word symbol Beech Nut has been continuously used by the opposer, P. Lorillard Company, or its predecessors in business and title as a trade-mark for tobacco products and particularly scrap tobaccos which are adapted to and utilized for both chewing and smoking purposes.

Third: This applicant denies that the opposer, P. Lorillard Company, is the owner of all the right, title and interest in and to the said trade-mark Beech Nut for tobacco products.

Fourth: This applicant denies that at all times since the alleged adoption of the trade-mark Beech Nut by the opposer, about 1899, or prior thereto, the opposer has continuously used the said trade-mark, or its predecessors in business, from whom it derived title, as a trade-mark for tobacco products, and particularly scrap tobaccos which are adapted to and utilized for both chewing and smoking purposes.

Fifth: This applicant denies that since the alleged adoption of the trade-mark Beech Nut by the opposer in 1899, or prior thereto, as aforesaid, the said trade-mark has been uniformly known and recognized as indicating the true origin of the goods and as being the true property of the opposer or its predecessors.

Sixth: This applicant denies that the tobacco products of opposer, P. Lorillard Company, and its predecessors in business, marketed under the said trade-mark Beech Nut, have had for many years and now have an enviable reputation as of superior quality.

Seventh: This applicant admits that the trade-mark Beech Nut sought to be registered by the applicant, Beech-Nut Packing Company, conflicts with the trade-mark Beech Nut of the opposer, but denies that the trade-mark Beech Nut sought to be registered by the applicant is an infringement upon any trade-mark rights of the opposer.

Eighth: This applicant denies that the goods for which applicant seeks to register the trade-mark Beech Nut

are of the same descriptive property and belong to the same class as those to which the trade-mark of the opposer has been and is now being used.

Ninth: This applicant denies that the trade-mark Beech Nut of the opposer has been in actual and continuous use as a trade-mark by the opposer and its predecessors since a date prior to the use of the word symbol Beech Nut as a trade-mark by the applicant, Beech-Nut Packing Company, prior to any use of the word symbol Beech Nut as a trade-mark by the applicant Beech-Nut Packing Company.

Tenth: This applicant admits that the word symbol Beech Nut sought to be registered by Beech-Nut Packing Company as a trade-mark is so similar in form, appearance, sound and other characteristics to the trade-mark Beech Nut of the opposer, as to be identical therewith, and actually does cause confusion to the purchasing public, and is liable to cause damage to the applicant, but denies that the use of the trade-mark by the applicant has caused any damage to the opposer, P. Lorillard Company, and denies that the P. Lorillard Company is the lawful owner of the trade-mark Beech Nut.

Eleventh: This applicant admits that the manner in which the Beech-Nut Packing Company uses its alleged trade-mark upon and in connection with tobacco products is such as to obviously cause confusion and deception to the purchasing public by leading the purchasing public into the belief that it is buying or accepting, and into buying or accepting the goods of the P. Lorillard Company in place of the goods of the Beech-Nut Packing Company.

Twelfth: This applicant avers that since 1891 this applicant and its predecessors have used the trade-mark Beech Nut as the predominating trade-name or mark of the business of this applicant corporation and its predecessors and for many years have used the trade-mark Beech Nut as part of the corporate name of the Beech-Nut Packing Company; that the business of the applicant is constantly expanding by adding to the line of manufacture of the applicant many new products which can be marketed through the same channels as its other products, and that the manufacture or sale of a tobacco product logically comes within the general line of expansion of the business of the Beech-Nut Packing Company.

Dated at Canajoharie, New York, December 5th, 1919.

BEECH-NUT PACKING CO.

By F. E. BARBOUR,

[Corporate Seal.]

Secretary.

OFFIELD & POOLE,

Attorneys for Beech-Nut Packing Company.

STATE OF NEW YORK, }
County of Montgomery, } ss.

On this 5th day of December, 1919, before me personally appeared F. E. Barbour, who being duly sworn, deposes and says that he is Secretary of Beech-Nut Packing Company, the applicant herein, and the person who signed this Answer on behalf of said applicant; that he has read the foregoing Answer as subscribed to by him and knows the contents thereof, and that the same is true of his own knowledge, except as to matters therein stated on information and belief, and as to those matters he believes them

to be true, and that as an officer of the Beech-Nut Packing Company he has full authority to sign this Answer in its behalf.

[SEAL.]

E. W. SHINEMAN,
Notary Public.

IN THE UNITED STATES PATENT OFFICE.

P. LORILLARD COMPANY	} Trade-Mark Oppo-
<i>vs.</i>	
BEECH-NUT PACKING COMPANY.	sition No. 2805.

Beech-Nut.

Acknowledgment of Service.

The undersigned, attorneys for P. Lorillard Company, do hereby acknowledge receipt and service of Answer filed in behalf of Beech-Nut Packing Company to the Notice of Opposition of P. Lorillard Company, Opposition No. 2805.

Signed at Washington, D. C., this 10th day of December, A. D., 1919.

MEYERS, CUSHMAN & REA,
Attorneys for P. Lorillard Company.

IN THE UNITED STATES PATENT OFFICE.

P. LORILLARD COMPANY	} Trade-Mark Oppo-
<i>vs.</i>	
BEECH-NUT PACKING COMPANY.	} sition No. 2805.

Beech-Nut.

Depositions of Witnesses.

Testimony taken on behalf of Beech-Nut Packing Company at the office of Beech-Nut Packing Company, Canajoharie, New York, beginning August 3, 1920, at 2:00 P. M., before Fred M. Geortner, a Notary Public, acting as special examiner by consent.

Present: Sebastian Hinton for Beech-Nut Packing Company; Richard B. Cavanagh for P. Lorillard Company.

Walter H. Lipe,

a witness called on behalf of the Beech-Nut Packing Company, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes and says. (Formal notice of this witness being waived.)

Question 1. Please state your name, age, residence and occupation.

Answer. Walter H. Lipe; age, 60; Canajoharie, N. Y.; Vice President and General Manager of the Beech-Nut Packing Co.

Q. 2. How long have you been connected with this Company?

A. Since 1891.

Q. 3. Under what name was the Company then operating?

A. Imperial Packing Company.

Q. 4. What products did the Company make in 1891?

A. Hams and Bacon.

Q. 5. Were these products labeled at that time?

A. Yes, sir.

Q. 6. With what label?

A. Imperial Ham and Bacon.

Q. 7. Was there any name or mark on the Hams and Bacon?

A. The first few months we did not have any but shortly after we chose the name "Beech-Nut."

Q. 8. How was the name Beech-Nut written?

A. It was two words, hyphenated, Beech-Nut.

Q. 9. Did the Imperial Packing Co. subsequently increase its line?

A. Yes.

Q. 10. Speaking of the period prior to 1904, can you state some of the products which were added to the line of the Imperial Packing Co.

A. Sliced Beef, Sliced Bacon, Grape Jam, Ginger Pear.

Q. 11. How were these products labeled?

A. They were labeled with Beech-Nut label.

Q. 12. To what extent was this label similar to the one employed on the hams?

A. It was supposed to be identical.

Q. 13. When was the name of your Company changed from the Imperial Packing Company to the Beech-Nut Packing Company?

A. 1899.

Q. 14. Was the Beech-Nut Packing Co. incorporated?

A. Yes.

Q. 15. How did it become the successor of the Imperial Packing Co.?

A. It bought the assets of the Imperial Packing Co.

Q. 16. Did the purchase include trade-marks?

A. Everything.

Counsel for the Beech-Nut Packing Co. introduced into evidence certified copy of Certificate of Incorporation of the Beech-Nut Packing Co.

Q. 17. Under what name does this Company still continue to operate?

A. Beech-Nut Packing Company.

Q. 18. Can you produce a summarized statement indicating the extent of the line of Beech-Nut Packing Co. for the year 1903?

A. Yes.

Q. 19. And subsequent to that date?

A. Yes.

Q. 20. Will you please explain how this statement which you have produced was made up?

A. From pricelists.

Stipulated that the original pricelists from which this summarized statement was made need not be produced in evidence; summarized statement to have all force of effect of such originals if produced.

Q. 21. I notice that the summarized statement begins with the year 1903. Will you please explain why it does not go back before that?

A. Because we had a fire and lost all records previous to 1903.

Q. 22. When was this fire?

A. February 26, 1903.

Q. 23. This summarized statement contains the name of a great many products. Will you kindly state under what name these products were sold?

A. Under the Company's name.

Q. 24. What brand appeared on the label? In addition to Beech-Nut Packing Co. was there any other name on these labels.

A. We had other brands, for instance "Mohawk," "Holly" and "Erie." We packed inferior goods to Beech-Nut under those brands.

Q. 25. First quality goods you always sold under Beech-Nut Brand?

A. Always.

Q. 26. In addition to the name Beech-Nut, did any other symbol or device appear on the label?

A. A picture of the beech nut always appeared on the label.

Q. 27. How long has this been?

A. Since 1892.

Q. 28. How long has the label been employed?

A. Since 1892.

Q. 29. How does the label upon goods which you have previously mentioned and upon the first quality of goods contained in the summarized statement you have produced, compare with the label now used by the Beech-Nut Packing Co.?

A. My memory is it is identical.

Q. 30. Will you please describe the conspicuous features of the Beech-Nut Packing Co.'s label?

A. I would say that it was red and white with beech-nut in the center and it contains the name Beech-Nut. It contained the name Beech-Nut prior to 1906 (I think) and after that the words Beech-Nut Brands.

Q. 31. How is the word Beech-Nut written?

A. It is written same as it always has been, same as on the letterheads, and same as on all printed matter.

Q. 32. Can you produce a collection of labels illustrating the labels used on the Beech-Nut line?

A. I can and do.

By Mr. Hinton: The collection of labels produced by witness is offered and introduced into evidence as Beech-Nut Exhibit Collection of labels.

Summarized statement from Beech-Nut price-lists produced by the witness is offered and introduced in the evidence as Beech-Nut Exhibit Summary of Products.

Q. 33. To what extent has the business of the Beech-Nut Packing Co. been advertised?

A. In dollars and cents, you mean?

Q. 34. Approximately.

A. I could not say, but I would say millions of dollars. I think I can get that information.

Q. 35. Will you please get a statement showing the extent of advertising year by year since 1910, at your convenience?

A. Yes, sir.

Q. 36. In what territories has this advertising been done?

A. Nationally.

Q. 37. State whether or not this advertising has featured the Beech-Nut Packing Co.'s label, which you have described and produced?

A. It does.

Q. 38. From your knowledge of merchandising and of the Beech-Nut Packing Co., will you please state what the Beech-Nut label which you have described and produced stands for in the minds of the public?

A. I believe it has stood for the best that could be made of the article on which it appeared.

Q. 39. Will you please state whether or not it was associated in the mind of the public with any particular article.

A. There are various degrees of that.

Q. 40. My question is directed to the fact that whether the presence of the Beech-Nut label indicated that whatever article so marked was a product of the Beech-Nut Packing Co. or whether it was associated solely with a single article.

A. I think it means many articles.

Q. 41. Would these articles be of the same character?

A. No, sir.

Q. 42. I notice from the summarized statement which you have produced that at least as early as 1911, the Beech-Nut Packing Company was selling chewing gum. I understand that this chewing gum bore the same label as applied to the rest of the Beech-Nut products, is that correct?

A. That is correct.

Q. 43. Can you produce a memo. taken from the records of your Company indicating the growth of the business in chewing gum of your Company?

A. Yes.

Q. Will you kindly write into the records the figures from this memo, which you have, showing sales of chewing gum in boxes by the year.

A. Yes, sir.

1912	829,089
1913	2,955,284
1914	5,124,797
1915	6,428,585
1916	7,231,891
1917	7,404,584
1918	3,392,707
1919	3,646,324

Q. 45. How many packages of gum were in a box?

A. Twenty.

Q. 46. You have testified about the standing of the Beech-Nut label, which you have described and produced, before the public. Upon what do you base your opinion as to the meaning of the Beech-Nut label to the public?

A. I can only say again that the Beech-Nut label means quality to the buyer.

Q. 47. Have you had any conversations which indicate to you that the Beech-Nut label has this meaning before the public?

A. Yes. I have had people say to me 'you can sell anything under the Beech-Nut label.'

Q. 48. How many times has that sort of conversation occurred?

A. Many times. My answer has always been that we had to make goods of high quality if they are to sell under the Beech-Nut label.

Q. 49. In what class of stores are Beech-Nut products sold?

A. In all kinds of stores.

Q. 50. State whether or not the Beech-Nut label, which you have described, is and has been prominently displayed in stores where the goods are sold.

A. It is.

Q. 51. How generally is this true?

A. It is true to the extent of our having used window display material to the extent of thousands of dollars per year, and that material has invariably been placed in the window.

Q. 52. I refer to the actual label on package.

A. Actual labels. All packages without exception bear fac-simile of the label or the package has a label on it. In fact on our chewing gum box there is a reproduction of the package.

Q. 53. How large was the business of the Imperial Packing Company in 1891? How many operatives did they employ at that time?

A. We had only five or six.

Q. 54. What is your monthly business at the present time?

A. Over a million dollars.

Direct examination closed.

Cross-Examination by Mr. Cavanaugh.

X-Q. 55. I understood you to say that the Imperial Packing Company in 1891 packed beef and bacon?

A. No, hams and bacon.

X-Q. 56. Can you produce any of the labels used by the Imperial Packing Co. on these products?

A. Not that I know of.

X-Q. 57. Are you familiar with the labels?

A. We might or might not have had what was called a label in those early months. As I remember it now within a few months of the start we put on the Beech-Nut label, for we realized after we started in business that "Imperial" was not a good name, was not a brand name. It was criticized by some people as being a foreign name, not an American name.

X-Q. 58. You were one of the Trustees of the Imperial Packing Co., were you not?

A. Yes, sir.

Offered in evidence by Mr. Cavanaugh: I now offer in evidence the certified copy of the Certificate of Incorporation of the Imperial Packing Co., and notary is asked to mark the same P. Lorillard Co. Cross Exhibit 20.

X-Q. 59. I have you herewith a Patent Office copy of registered trade-mark No. 19838 dated July 7, 1891, to the Imperial Packing Co. for hams and bacon, and the drawing of this registration copy shows what is evidently a label. Do you ever recall the Imperial Packing Company used a label like that upon its goods?

A. That was branded on the ham. Branded in with an iron.

X-Q. 60. The entire representation?

A. Yes, without doubt.

X-Q. 61. I also show you a Patent Office copy of trade-mark Reg. No. 24978, dated July 3, 1894, to Imperial Packing Co. for Pork Lard. Do you ever recall that label being used by the Imperial Packing Co. on its goods?

A. That was another brand, used by branding with iron.

X-Q. 62. Do you recall that label?

A. That looks just like an old branding iron to me.

X-Q. 63. I also call your attention to Patent Office copy of registered trade-mark No. 36,444, registered May 21, 1901, by the Beech-Nut Packing Co. Do you recognize that label or mark shown on the drawing?

A. Yes, I recognize that.

X-Q. 64. Did the Beech-Nut Packing Co. use that identical mark?

A. In connection with something else, in connection with label or something.

X-Q. 65. What I want to know, did the Beech-Nut Packing Co. ever use that identical mark shown in that drawing?

A. I think it was used in connection with wording.

X-Q. 66. Did it have a circle?

A. It is evident it had.

X-Q. 67. Likewise the Imperial Packing Co. used the matter shown on the two registrations?

A. Those were brands as I stated.

X-Q. 68. Never used it in the form of a label?

A. I do not remember that. I do remember the brands.

X-Q. 69. Both brands are identical with the drawings?

A. They must have been.

X-Q. 70. I understand you cannot produce any of the labels originally used by the Imperial Packing Co.

A. I do not think we could. Everything we had was burned in 1903, unless we could get something from some outside place.

X-Q. 71. Can you state when the Beech-Nut Packing Co. began the use of the oval in connection with its label or mark?

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A. My memory is from the very first.

X-Q. 72. What date was that?

A. I would say in 1892.

X-Q. 73. I understand you used that mark on all its goods?

A. All except the other brands, viz., Mohawk, Holly and Erie, so branded because they were not as good as Beech-Nut.

X-Q. 74. I have called your attention to the trade-mark that showed a circle and showed a beech nut.

A. I think that was used only for burning purposes.

X-Q. 75. Was it used on canned goods?

A. We did not make canned goods at that time. It may have stipulated that, but we did not make them.

X-Q. 76. I am directing your attention to trade-mark 36,440 registered May 21, 1901. It shows a circle with the word Beech-Nut and picture of nut with three leaves in the center. In the certificate of registration it is stated:

"It is usually displayed on the cans, jars, boxes and other packages containing the goods, by placing thereon a printed label on which the described trade-mark is shown."

Now, this registration No. 36,444 does not show the oval but it shows a circle. I understood you to state from the beginning you have used the oval trade-mark such as shown on the specimen label you have produced.

A. That is my memory.

X-Q. 77. You do not recall that the concern used that on canned goods?

A. I do not recall that the Company used that other than to burn into the meat.

X-Q. 78. But that trade-mark No. 36,444 is for canned goods.

A. We did not make any canned goods at that time.

X-Q. 79. As I understand it at the time this trade-mark was obtained you did not make canned goods?

A. Yes, that is from the standpoint of glass jars.

X-Q. 80. You do not recall having used that mark?

A. I do not recall. I recognize it as something we used in burning into the brand, and I think on account of the small size of that we had difficulty in making the impression with such a long brand, and I think possibly that was the idea of using that without letters or printed matter.

X-Q. 81. Your recollection is, as I understand it, you used the oval since the Beech-Nut Packing Co. was incorporated?

A. My recollection is we used the oval label on hams and bacon since 1892.

X-Q. 82. Then it appears that although your Company registered trade-marks 24978 and 36,444 in the Patent Office in 1892, you did not at that early date show the present oval label which is shown on the specimen.

Objected to by Mr. Hinton: That question is objected to as being entirely unwarranted. The witness has not been qualified to state that he knows all of the early registrations of the Beech-Nut Packing Co. nor has there been any further evidence offered to indicate how many additional registrations were obtained for that Company.

By Mr. Cavanaugh: The witness was one of the Trustees or officers of the original Imperial Packing Co. and is now an officer of the Beech-Nut Packing Co., and as such is presumed to be familiar with the business.

By Mr. Hinton: He would not necessarily be familiar with the great many registrations of the Company, neither would he necessarily be familiar with the very minor variations in the labels. It is particularly called to the attention of the Court that in Registration No. 19,838, it is stated emphatically: that the various accessories including the name Imperial Packing Company, and other features of the picture with the exception of the word "Beech-Nut" may be varied or omitted, and statement to the same effect appeared in Registration No. 36,444 and in Registration No. 24,978 of 1894 these words appear:

"The trade-mark of said company consists of the word-symbol "Beech-Nut." This has generally been arranged as shown in the accompanying fac-simile, consisting of an oblong card in the lower left hand corner of which is a representation of the leaf of beech tree resting on an oval, etc."

These remarks are interjected simply to clear up the matter at the proper place.

X-Q. 83. In this summary of goods sold by the Beech-Nut Packing Company, that you have produced, I ask you if the schedule for each year as set out therein is complete as to the general character of the goods put out by this Company?

A. Yes, I think so, taken right from the pricelists.

X-Q. 84. As I understand it, in 1919, the Beech-Nut Packing Company packed and marketed bulk goods, ham and bacon; sliced bacon and beef in glass; Sauce, Catsup, Preserves of various sorts; Jellied Fruit; Chewing Gum and Candies. Is that right?

A. Yes.

X-Q. 85. That is about a complete list of goods. Have not mentioned every article that appeared on the list.

A. Yes.

X-Q. 86. Did you put out any cigarettes?

A. Yes.

X-Q. 87. When did you put out the cigarettes?

A. I could not tell you the exact date.

X-Q. 88. It was in the year 1919, was it not?

A. I could not say that for sure.

X-Q. 89. Are you putting out any cigarettes or other tobacco products today?

A. No, sir.

X-Q. 90. When did you stop putting them out?

A. We only made two or three sales of cigarettes. I do not know that there was more than one sale. I could not tell you when.

X-Q. 91. Would your records show that?

A. Yes.

X-Q. 92. Would you mind telling me the name of the party you sold them to?

A. I will get it later.

X-Q. 93. I note that your application for registration of trade-mark for cigarettes No. 119,930, and which is involved in this opposition proceedings, claims a trade-mark use of the word Beech-Nut for cigarettes since June 12, 1919. Will that assist in refreshing your recollection as to the date when the Beech-Nut Packing Company began to put out cigarettes.

A. I have to be governed by what the records show.

X-Q. 94. Did the Beech-Nut Packing Co. ever put out other tobacco products outside of cigarettes?

A. Not that I know of.

X-Q. 95. How large a quantity of these cigarettes was put out?

A. I would have to refresh on that by the actual sale.

X-Q. 96. Did I understand you to say that you had available at the present time a sample package of the cigarettes?

A. I do not know if we have or not. I could find out by inquiring.

X-Q. 97. Did you ever see one of these packages of cigarettes?

A. Yes, sir.

X-Q. 98. Can you describe it to me? How was it labeled?

A. I cannot describe it. I cannot give what might be called a good description.

X-Q. 99. What was the color of the box?

A. I would have to see it to give you an accurate description. I would not want to say it was white and red and then have it turn out blue and red.

X-Q. 100. How was the word Beech-Nut printed on?

A. Will see if I can find a package.

The witness produced a package of cigarettes bearing the word "Beech-Nut" thereon. Hands it to the counsel for Lorillard Co.

X-Q. 101. This package represents the cigarettes as they were packed and put out by the Beech-Nut Packing Co.?

A. Yes.

X-Q. 102. This package does not show the oval label or picture of Beech-Nut and Beech-Nut inside the oval, does it?

A. No, sir.

X-Q. 103. So you did not use on these cigarettes the oval label which you use on the other Beech-Nut goods?

A. No, sir.

X-Q. 104. To the best of your recollection the Beech-Nut cigarettes which you sold were packaged and labeled as shown in the specimen box you have produced?

A. I would not want to answer that because we might have some labels with the oval.

X-Q. 105. For how long a period did you sell cigarettes or were they on the market under this Beech-Nut name?

A. I think we made one sale.

X-Q. 106. That was since 1919?

A. Whatever our sales show in the books.

X-Q. 107. Did the Imperial Packing Co. ever make tobacco products and sell them under the name "Beech-Nut"?

A. No, sir.

X-Q. 108. Who made those cigarettes?

A. I think the American Tobacco Co.

At this point the witness furnished 2 oval labels and makes the verbal statement: my memory is we could not get those labels for ten days or two weeks but they were ordered. If we sold more we would have sold them with that label.

Mr. Hinton: By that label you mean the label just produced?

A. Yes, sir.

X-Q. 109. But this Beech-Nut label which you just produced was never used on the goods, on that one sale?

A. I do not know of any. I could not tell you.

X-Q. 110. Did you see the labels in the Patent Office?

A. No, I did not see them. This was looked after by our attorney.

X-Q. 111. You say the American Tobacco Co. made these cigarettes?

A. No, I would not say so.

X-Q. 112. At the present time you do not know who made the cigarettes?

A. My memory is that someone told me they were made by the American Tobacco Co. That is all I know about it.

X-Q. 113. That is all you know about it?

A. Yes, that is all I know about it.

X-Q. 114. Does the Beech-Nut Packing Co. handle or pack tobacco products of any sort at the present time?

A. No sir.

X-Q. 115. Up to the present time the only tobacco put out was one order. Is that correct?

A. My memory is that the only cigarettes we bought and sold was this particular lot. They might be sold to more than one person. I would have to be governed by what the books say.

X-Q. 116. You will furnish me a statement as to whom you sold that order of cigarettes?

A. Yes.

X-Q. 117. I call your attention to trade-mark No. 35,-731, reg. January 8, 1901, by Beech-Nut Packing Company for cured, dried and smoked beef, and direct your particular attention to the drawing of the registration. Do you recall that identical mark being used on the labels?

A. No, I do not remember that ever having been used except it was for branding purposes. I know we bought some of those burr branding iron and when we tried to brand the burr in it always burned, it never was a success.

X-Q. 118. You do not recall the design or mark being used?

A. I do not recall it being used for label. We might have used it for a branding iron. It does not mean anything to anyone without wording or anything of that kind.

X-Q. 119. Were you present with Mr. Bartlett Arkell at an interview or conference at the office of the P. Lorillard Co. about July, 1919?

A. I remember calling on Mr. Mahoney and some other gentlemen, but I do not know the date. It was the only time I was ever there so it must be the time you mention.

X-Q. 120. What was the subject matter discussed?

A. It was a general talk, about the Beech-Nut label being used by the Lorillard Co.

X-Q. 121. That is all you recollect?

A. I recall it was a pleasant interview. I do not recall anything special about it. I know when we came away the general feeling was we had not accomplished very much.

X-Q. 122. You knew the Lorillard Co. intended to put out a Beech-Nut cigarette?

A. They told me they did. They showed me a package of cigarettes.

X-Q. 123. You do not recall the date?

A. I think it is within two years. Maybe a little over a year. I know the one thing that impressed me that made me feel that Lorillard really had taken advantage of us—I may not be exact in this—but I remember this sort of a slogan on the cigarettes and it was more or less red—"The first cigarette of Beech-Nut quality ever offered to the trade."

X-Q. 124. You knew the Lorillard Co. were putting out tobacco product under Beech-Nut label, did you not?

A. Certainly.

X-Q. 125. Before you started to put out cigarettes, you knew it?

A. I remember Mr. Mahoney said they had ordered a lot of labels. We talked about their changing the label. It was some sort of a conversation like this. We said the labels on the Beech-Nut cigarettes, for instance, looked like a Beech-Nut label, had same style of letters. There was some talk as to if or not they would change, at least the lettering, and the same color of label so that they did not copy our letters, copy our color and should change their slogan so that it did not mean "Beech-Nut" to the average person.

X-Q. 126. It was not a question of the word "Beech-Nut"?

A. We never got to that. We had doubts about it, but I do not remember there was anything said about it. We had a long talk but I do not remember every word.

X-Q. 127. The main discussion in your interview, as you remember it, was the label?

A. Style of letters, color, etc. When we came away we felt that we had not gained anything—that we had not found a common ground. I think my memory is pretty clear on this that Mr. Mahoney inferred if we would consider reimbursing them for the amount they had paid out for the labels, they would change the label or discontinue. That is the impression he gave me. I would not say that was really spoken, but I gathered if we said to him we would make goods for the money put into these labels, he would have said they would quit. Possibly he did not intend that at all.

X-Q. 128. As you understand it, if you had reimbursed them for the labels he would have changed the style of labels?

A. I would not say that he said that, but that was the inference—he would change it or something like that.

X-Q. 129. Did your Company as early as 1915 know that the Lorillard Co. was putting out a tobacco?

A. We knew it as soon as they put it out. If it was 1915, we knew it within a month. A man wrote us in July, an old stockholder of the Beech-Nut Packing Co., and sent us an order for a certain amount of Beech-Nut tobacco. That is five years after they started to put out that tobacco, and while this man was a stockholder in this Company and supposed to be fully conversant with all the Beech-Nut products, he did not know but that the Beech-Nut Packing Co. made these goods.

X-Q. 130. What do you do with these orders for Lorillard Co.?

A. We refer them to Lorillard Co.—many, many of them.

Redirect Examination.

Rd-Q. 131. You said that orders were received by you for Beech-Nut Scrap Tobacco. These orders were sent to the Lorillard Co.?

A. I do not say that we sent them, but referred the customer to the Lorillard Co.

Rd-Q. 132. What did you do that for?

A. We did that as we wanted the buyer to know that we did not make tobacco.

Rd-Q. 133. Did you want the buyer to get some response to his inquiry: in other words, why did you not ignore them?

A. We could not ignore them. These are all good customers of ours, men who order without even putting in the price or without requesting price, simply order 25 cases, 50 cases, a gross—whatever it may be. We want a man to get a response to his order so we reply.

Rd-Q. 134. To what extent, to your personal knowledge, have these orders been received?

A. We have received numerous orders. I think the records will show a considerable number. I do not know how many.

Redirect examination closed.

Deposition closed.

WALTER H. LIPE.

By Mr. Cavanaugh: Copies of trade-mark registrations 19,838; 24,978; 35,731 and 36,444 are fastened together to form one exhibit and are introduced in the evidence, and notary is asked to mark the same "P. Lorillard & Co. Cross Exhibit 21."

The oval cigarette label, Beech-Nut Brand, produced by the witness, Mr. Lipe, is offered in evidence, and notary is requested to mark the same "P. Lorillard & Co. Cross Exhibit No. 22."

Thomas Lynch,

a witness called on behalf of the Beech-Nut Packing Company, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes and says. (Formal notice of this witness being waived.)

Question 1. Please state your name, residence, age and occupation.

Answer. Thomas Lynch, 43 Cliff St., Canajoharie, 76, retired.

Q. 2. Were you ever employed by the Beech-Nut Packing Co.? If so, between what years?

A. I was first employed by the Imperial Packing Co., January 1, 1892, and I continued in their employ until April, 1917.

Q. 3. What did you do for the Company during the year 1892?

A. I traveled on the road and sold Beech-Nut hams and bacon to Beech-Nut customers, through the Eastern states, New York and Pennsylvania. After that I took charge of the plant as foreman and continued as such for several years until the business was divided. Then I took charge of the bulk meat department until I retired.

Q. 4. What was the Company selling in 1892?

A. Hams, bacon and lard.

Q. 5. Did these products bear any label when they were put on the market?

A. They did.

Q. 6. Can you describe a label that was on the ham?

A. I would have to describe it from the present label. Oval label with the word "Beech-Nut" on the top, ham at the bottom, a red border and design of beech nut burr in the center.

Q. 7. Did the word Brand appear on the older labels?

A. Not at that time.

Q. 8. What sort of a label was used on the bacon in 1892?

A. The same style of printing but the label was oblong and had rounded corners instead of the oval label.

Q. 9. How long did these labels continue to be used?

A. During my whole service.

Q. 10. Can you produce some of the stationery used by the Imperial Packing Co. in 1892?

A. I can.

Q. 11. Where did you get this sheet?

A. In the first place, I got it from the office of the Imperial Packing Co. After I stopped traveling for the Company, I put that away in my desk at home with other papers and it has been there ever since.

Q. 12. Is this one of the sheets you carried with you in 1892?

A. It is. There is also a small size sheet.

Sheet produced by the witness is offered in evidence as Beech-Nut Exhibit Stationery of 1892.

Q. 13. Do you know Mr. Clarence Lindholm?

A. I do.

Q. 14. Did he ever have any connection with you in connection with the Beech-Nut Packing Co. or its predecessor? If so state same.

A. He was employed by the Imperial Packing Co. while I was traveling on the road in 1892, and he continued in the employ of the Company after I became foreman of the Company.

Q. 15. What was his duty?

A. Helping to handle the meat, wash it, bring it to the smoke and take it out of smoke, and as a boy his work was to label the hams and bacon and some times cut the sacks.

Direct examination closed.

Cross-Examination by Mr. Cavanaugh.

X-Q. 16. Mr. Lynch, I call your attention to the copies of trade-mark registrations which are numbered 19,838, 24,978, 35,731 and 36,444. Do you recall that design of label of 19,838?

A. No, I do not.

X-Q. 17. Do you recall design of label of 24,978.

A. I really do not remember the label that was put on the lard but it was an oval label and we had a hard time to make the label stick.

X-Q. 18. You do not remember that particular label?

A. No.

X-Q. 19. Do you recall 35731. Do you recall seeing that design?

A. No, I do not know where we would use that design with circle. As I remember it all the labels had the other design on them.

X-Q. 20. Did they have circles?

A. There were none in my department.

X-Q. 21. As to label 36,444, do you remember it?

A. I remember Beech-Nut Brand in that manner and this design of the beech nut.

X-Q. 22. Do you recall the circle?

A. No.

X-Q. 23. Did you ever sell Beech-Nut Tobacco?

A. Never heard of it before.

Cross-examination closed.

Deposition closed.

THOS. LYNCH.

Clarence Lindholm,

a witness called on behalf of the Beech-Nut Packing Company, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes and says. (Formal notice of this witness being waived.)

Question 1. Your name is Clarence Lindholm, you are forty-five years of age, residence Canajoharie, N. Y., present employed by the Beech-Nut Packing Co. in its Traffic Department. Is that not correct?

Answer. That is correct.

Q. 2. When did you first begin to work for the Beech-Nut Packing Company?

A. In 1891.

Q. 3. How long did you work subsequent to 1891?

A. I worked in 1891 and during the year 1892.

Q. 4. And then severed your connection with the Company?

A. Yes.

Q. 5. When did you return to the Company?

A. About six years ago—in 1914.

Q. 6. Do you know Mr. Thomas Lynch?

A. I do.

Q. 7. Was he employed by the Company when you first came with the Company?

A. He was.

Q. 8. What was he doing?

A. On the road traveling for the Beech-Nut Packing Co.

Q. 9. What were your relations subsequent?

A. My job was to put labels on the hams and bacon, cut the sacks and take meat out of smoke.

Q. 10. Did you work under Mr. Lynch?

A. Yes.

Q. 11. Can you describe from memory the labels employed by the Imperial Packing Co. on hams and bacon in 1891 and 1892.

A. Yes. The ham label was an oval label with Beech-Nut trade-mark, with Beech-Nut burr in the center and had a red margin upon it.

Q. 12. What was the bacon label like?

A. The bacon label was a long label with rounded corners with the word "Beech-Nut Bacon" with the same trade-mark as Beech-Nut Ham and the word Beech-Nut hyphenated in both instances.

Q. 13. Are any of these labels available at the present time?

A. No, sir.

Q. 14. Why not?

A. Fire destroyed the records of the old labels.

Q. 15. Can you relate any circumstance in addition to the fact that you actually did the labeling, which makes your recollection of these labels clear?

A. Yes, I can. We had a stringer in the room and on that stringer we had a number of labels. Hams were placed thereon,—gone out of existence now.

Cross-Examination by Mr. Cavanaugh.

X-Q. 16. I call your attention to certain U. S. trade-marks Nos. 19,838, 24,978, 35,731 and 36,444. Will you examine these and tell me if you recall the use of any or all of these labels as shown on the drawing on the packed products of either the Imperial Packing Co. or the Beech-Nut Packing Co.?

A. Lard label No. 24,978 was used after my employment. We did not handle lard. No. 35,731 and 36,444 are cuts representing a branding iron. 19,838 represents a brand—a brand put on by a branding iron.

Witness is pointing to device showing the ham and picture of which appears in the panel.

X-Q. 17. As to trade-mark 24978, you never saw that used by the Company?

A. No, I did not.

X-Q. 18. As to the No. 19,838, did you ever see or know of any brand used by the Company showing the oval panel, that is with the words "Sweet Beech-Nut Ham, Imperial Packing Co., Canajoharie, N. Y.," with the center rectangular shaded, strips across the oblong in addition to the brand on the ham itself, which was already pointed out: in other words, did you ever see that complete device used upon any Beech-Nut products?

A. No, I did not.

X-Q. 19. You say that the mark or device shown in the drawing of No. 36,444 represents a brand?

A. Represents the impression that a branding iron makes on the side of a ham.

X-Q. 20. That is including the circle?

A. Yes.

X-Q. 21. I call your attention to 36,444 is for canned goods and that it says, "It is usually displayed on the cans, jars, boxes and other packages containing the goods, by placing thereon a printed label, on which the described trade-mark is shown." Do you recall a printed label on canned goods of the Beech-Nut Packing Co. showing that circle?

A. Yes, sir.

X-Q. 22. Note that on canned goods they did not show the oval entirely but also used circle.

A. Yes, sir.

X-Q. 23. That was while you were with the Company?

A. No. Wait—at the time, 1891 and 1892 there were no canned goods. That was ahead of my time.

X-Q. 24. This was in 1901.

Mr. Hinton.

Rd-Q. 25. You were not connected with the Company in 1901?

A. No.

Mr. Cavanaugh.

Rx-Q. 26. We had reference to canned goods. So you do not know anything about these marks?

A. No, and still I do in a way because I handled the goods although I did not work for the Beech-Nut Packing Co. I sold them over the counter in retail store.

Rx-Q. 27. Did you handle any Beech-Nut goods with a circle on them like that?

A. Yes. As I recall it the label on the Conserves had a circle inside.

Rx-Q. 28. Ever handled any tobacco under the name of Beech-Nut?

A. No, sir.

Rx-Q. 29. Do not handle any now?

A. No.

Redirect Examination by Mr. Hinton.

Rd-Q. 30. As I understand it, the hams were branded and labeled both?

A. Yes.

Rd-Q. 31. Where was the brand put?

A. On the back or hide of the ham.

Rd-Q. 32. Where was the label put?

A. The label was put on the outside of the ham. Most of the hams were canvased and the label would be on the outside of the canvas.

Rd-Q. 33. The brand is out of sight?

A. Yes, out of sight.

Cross-examination closed.

Deposition closed.

CLARENCE LINDHOLM.

J. Wesley Wood,

a witness called on behalf of the Beech-Nut Packing Company, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton deposes and says. (Formal notice of this witness being waived.)

Question 1. Your name is J. Wesley Wood, you are a traveling salesman with the Beech-Nut Packing Co., your residence is Troy, N. Y., is that correct?

Answer. That is true.

Q. 2. How long have you been connected with the Beech-Nut Packing Co.?

A. About twenty-two or twenty-three years.

Q. 3. In what capacity?

A. Salesman.

Q. 4. During that time have the products of the Beech-Nut Packing Co. been labeled? If so, please describe the label on the first quality of goods.

A. Beech-Nut label has been an oval label with the outer edge red and white, center of the label there is another oval surrounded by a blue line with the word Beech-Nut hyphenated, usually blue and underneath that the Beech-Nut in colors.

Q. 5. What does that label stand for before the public?

A. It stands absolutely as a quality label. It is understood by the consumer and trade to indicate the highest quality goods possible to pack.

Q. 6. Is that label associated by the public to one article?

A. Of course with some of our original products. The line has continued to increase so that it is now associated with the full line.

Q. 7. What does that label indicate to the consumer of the goods?

A. That it was packed by the Beech-Nut Packing Co.

Q. 8. Has the public seen from time to time that new goods, different from old goods, bore the same label?

A. Yes.

Q. 9. What is the effect of the use of that label upon new goods of different character from the old goods previously offered?

A. They are willing to accept it at once as the same high quality goods as all the others.

Q. 10. And as made by any particular concern?

A. As made by the Beech-Nut Packing Co.

Q. 11. Have you in your experience ever come across a scrap tobacco sold under the name "Beech-Nut" put out by the Lorillard Co.?

A. Yes, I have.

Q. 12. How is that tobacco received by the public?

A. I think a great many people thought it was a product of the Beech-Nut Packing Co.

Q. 13. On what do you base your answer?

A. From the large number of people who call my attention to the fact and who ask me how long we have been in that business.

Direct examination closed.

By Mr. Cavanaugh.

X-Q. 14. Did you ever sell tobacco?

A. No, sir.

X-Q. 15. Do you know anything about the tobacco business?

A. Only from observation.

X-Q. 16. Do you know how tobacco is sold or made or blended or anything of that sort?

A. No, so that I would be an expert.

X-Q. 17. Do you know how the tobacco is received in the trade?

A. No, sir.

X-Q. 18. You do not know what it is to make a tobacco a success on the market?

A. Perhaps I should say no.

X-Q. 19. You do not know where it comes from, you do not know anything about it?

A. Only from observation.

X-Q. 20. If you were going to buy a food product you would not take a package of tobacco in place of that product, would you?

A. No.

X-Q. 21. Do you know how the Lorillard people are regarded as to standing, in the trade?

A. I should judge they had good standing.

X-Q. 22. Do you know the amount of business it does per year?

A. I do not.

X-Q. 23. Know about the selling force and the tremendous selling organization?

A. I do not.

X-Q. 24. You have seen a package of the Lorillard Beech-Nut Tobacco?

A. Yes.

X-Q. 25. Does the word Lorillard appear on it?

A. I presume it does.

X-Q. 26. I show you a package of Lorillard Beech-Nut Tobacco, which is like P. Lorillard Exhibit No. 16, with the word Lorillard appearing on it. I call your attention to certain copies of trade-mark registrations as follows: I first direct your attention to No. 19,838 to Imperial Packing Co. Did you ever see that label used by the Imperial Packing Co.?

A. I do not know that I have just like that.

X-Q. 27. As to registration 24,978, did you ever see that?

A. I never sold lard. Never handled it.

X-Q. 28. As to 35,731, did you ever see that label with the circle?

A. I do not recall it.

X-Q. 29. As to 36,444, which is for canned goods, did you ever see that circle?

A. I do not recall it.

X-Q. 30. You do not know if they ever used this or not?

A. Not to my knowledge.

X-Q. 31. Did you ever sell Beech-Nut Tobacco for the Beech-Nut Packing Co.—cigarettes?

A. No, sir.

X-Q. 32. So far as you know this Company does not manufacture cigarettes?

A. No, sir.

X-Q. 33. Or any tobacco products?

A. Not to my knowledge.

Cross-examination closed.

Deposition closed.

J. WESLEY WOOD.

Adjourned till Aug. 4, 1920, 10:00 A. M.

Convened Aug. 4, 1920, 10:00 A. M.

Present as before.

W. C. Arkell,

a witness called on behalf of the Beech-Nut Packing Company, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes and says. (Formal notice of this witness being waived.)

Question 1. Your name is W. C. Arkell, age 32, residence Canajoharie, N. Y., you are Assistant Secretary of the Beech-Nut Packing Co. Is that true?

Answer. That is true.

Q. 2. How long have you been connected with the Beech-Nut Packing Company?

A. In one way or another since the Spring of 1911, except during the war.

Q. 3. Has the Beech-Nut Packing Co. to your knowledge received orders for Beech-Nut Scrap Tobacco?

A. It has.

Q. 4. To what extent and from whom?

A. Numerous orders. They came from jobbers mainly who buy our other products.

Q. 5. What has been done with the originals of these orders in most instances?

A. At first the customers were advised that we did not manufacture that product, after that they were sent direct to Lorillard Co., in a number of instances and still later sent to you.

Q. 6. Were some of these orders returned to customers?

A. I do not believe the orders were returned to them, they were written. The original order was not on an order blank but simply on a letterhead.

Q. 7. Is it your practice to make for inter-departmental use, copies of correspondence received from customers?

A. Yes, to a considerable extent.

Q. 8. Can you produce an illustrative collection of inter-departmental copies of correspondence received from customers and letters addressed to customers in connection with orders received by your Company for Beech-Nut Scrap Tobacco?

A. Yes.

Stipulated that the copies produced by witness may be used in place of and with the effect of the originals. Copies produced by the witness are offered and introduced into the evidence as Beech-Nut Exhibit Correspondence.

Q. 9. Have you at the present time a stock of labels used for cigarettes, corresponding to Lorillard Cross Exhibit 22?

A. We have.

Q. 10. Are you prepared to continue the exploitation of cigarettes after the solution of the present controversy with the Lorillard Co. is settled?

A. We are.

Q. 11. How long has the Beech-nut Packing Co. had under discussion the sale of cigarettes under the Beech-Nut label?

A. That matter has been considered as far back—I forget—possibly two or three years before the war, something like 1914, 1915, 1916. I went in the army in 1917 and it was way ahead of that. I can only say in that connection, at one time or other possibly everything that could be sold in a grocery, drug or confectionery store has been considered. Our favorite method of considering products is to take a wholesale grocery, drug and confectionery catalogue and see what items could be merchandised through our company.

Direct examination closed.

Cross-Examination by Mr. Cavanagh.

X-Q. 12. Did you have anything personally to do with the getting up of the Beech-Nut cigarettes put out by the Beech-Nut Packing Co.?

A. I did not.

X-Q. 13. Beech-Nut Packing Co. is not now putting out any tobacco products under the name of Beech-Nut?

A. Not just at the present moment.

X-Q. 14. Do you know when it first started to put out Beech-Nut cigarettes?

A. No, I do not know the dates.

X-Q. 15. When did you enter the army?

A. I entered the army in August, 1917.

X-Q. 16. When were you discharged?

A. December 11, 1918.

X-Q. 17. So you were connected with the Beech-Nut Packing Co. as Assistant Secretary in July, 1919?

A. No. I was here, but I was not Assistant Secretary.

X-Q. 18. You were in the office?

A. Yes.

X-Q. 19. You were familiar with the business of the Company at that time?

A. Yes.

X-Q. 20. You do not know when they began to put out cigarettes?

A. I simply do not know, because I have not the books here and I have not looked it up.

X-Q. 21. Have you any idea as to the extent of the sales?

A. They made several sales.

X-Q. 22. Can you give an idea of the quantity of these sales?

A. They were not large sales. Not any more than any product when first put out.

X-Q. 23. Did you ever sell tobacco products under the name Beech-Nut from this plant here at Canajoharie?

A. No, sir.

X-Q. 24. You are not now selling it?

A. No, sir.

X-Q. 25. Mr. Arkell, I show you copy of a letter purporting to be written by James R. Offield, counsel

for the Beech-Nut Packing Co., to yourself, dated July 22, 1919. Do you remember seeing that letter?

A. I think I do.

It is stipulated between counsel that the letter may be read in full into the records, subject to comparison and correction, and it is further stipulated that a copy of this letter was sent to the P. Lorillard Co. by Mr. Bartlett Arkell, President of the Beech-Nut Packing Co.

OFFIELD & POOLE,
1225 Monadnock Bldg.,
Chicago, Ill.

July 22, 1919.

MR. W. C. ARKELL,
c/o Beech-Nut Packing Co.,
Canajoharie, N. Y.

Dear Sir:

In re. Beech-Nut Stogie Company.

In reply to your letter of June 10th, the fact that you were aware of the existence of the Beech-Nut Stogie Company and have actually filled their orders with your goods without making any complaint will, of course, have a bearing upon the question of damages in the event you sued them, but I doubt if it would have any bearing upon your right to stop the use by them of your mark. Of course, the time to have taken the matter up was upon the first shipment, but that is now past and I think it would be a good idea to call this matter to the attention of the Lorillard Company and let them take steps against the Beech-Nut Stogie Company as they are in a much better position to do so than the Beech-Nut Packing Co.

Very truly yours,

JAMES R. OFFIELD.

X-Q. 26. I understood you to testify that you sent a number of orders which you received for Beech-Nut Scrap Tobacco to the Lorillard Co. Why did you do this?

A. Most of these customers who sent in these orders are good customers of ours, and as a matter of common honesty to the customer we would have to do a thing of that kind.

X-Q. 27. You knew all the time that the P. Lorillard Co. was putting out a tobacco product under the name Beech-Nut?

A. It depends on what you mean by all the time. I do not suppose we knew when it was first put out.

X-Q. 28. I mean at the time you received these letters and sent them to Lorillard Co.

A. Certainly.

X-Q. 29. You knew the P. Lorillard Co. had Beech-Nut tobacco on the market before you ever had your Beech-Nut cigarettes made, did you not?

A. Yes

X-Q. 30. Did you ever put out a cigarette with label like P. Lorillard Cross Exhibit No. 22 on it?

A. No, sir.

X-Q. 31. You never used that label?

A. No, sir.

X-Q. 32. Yesterday during the examination of Mr. Walter H. Lipe, I requested him to produce an invoice for orders showing the sale to customers of your Beech-Nut cigarettes, and after his examination he kindly produced an invoice from the American Tobacco Co., Order No. 19122, showing that the American Tobacco Co. on July 12, 1919, sold to the Beech-Nut Packing Co. and shipped to three separate parties:

B. Arkell,
Equitable Bldg.,
New York City, N. Y.
James R. Offield,
1223 Monadnock Bldg.,
Chicago, Ill.
New Jersey Tob. Co.,
Jersey City, N. J.

2060 Beech-Nut cigarettes, total net cash value of \$11.85. Can you tell me if that represents all of the Beech-Nut cigarettes made for and sold on behalf of the Beech-Nut Packing Co.?

A. No, I cannot.

X-Q. 33. You do not know if there were any other sold?

A. No.

X-Q. 34. Did you know there were only one or two orders sold?

A. No.

X-Q. 35. Did you know there were only one or two orders sold?

A. There were several orders. I do not know if there were one, or two or three. There were several.

X-Q. 36. Do you mean that there were other sales than those indicated by this invoice of July 12, 1919?

A. There were several billings from us. That would not constitute a billing by us, that was a billing to us. There were several billings by us. I do not know the details without looking up our records. I do not carry that in my mind.

X-Q. 37. Would your records here show all sales and shipments by the Beech-Nut Packing Company of Beech-Nut Cigarettes?

A. Yes.

X-Q. 38. Will you produce for me records showing such shipments and reference to whom the goods were shipped?

Mr. Hinton: I have no objection to the witness examining the records, but I do not want the witness to supply the Lorillard Co. with names of Beech-Nut Packing Co.'s customers for cigarettes. He can ascertain whether or not additional sales have been made and state the facts from the records.

Mr. Cavanagh: This witness has testified that his concern has made several sales of Beech-Nut cigarettes. Certainly to investigate the truth of his story on his testimony I am entitled to know the persons to whom such sales were made. It is very evident as the witness has testified that there were relatively few sales and that no sales are now being made and that we are entitled to know the extent of such sales.

X-Q. 40. Did any other concern other than the American Tobacco Co. make Beech-Nut cigarettes for the Beech-Nut Packing Co.?

A. No, sir.

X-Q. 41. Does this invoice of July 12, 1919, represent the total amount of cigarettes made for your concern by the American Tobacco Co.?

A. To the best of my knowledge and belief.

X-Q. 42. The Beech-Nut Packing Co.'s business is that of packing shipping food products, is it not?

A. I should say it includes the packing and shipping of food products. It would not say that it was exclusively confined to the sale of food products.

X-Q. 43. What other products does it pack and ship outside of food products?

A. Chewing gum, beverages, tinfoil, formerly made corrugated boxes, and makes those by a subsidiary company now.

X-Q. 44. Does the Beech-Nut Packing Co. make and sell tinfoil under the name Beech-Nut?

A. It does not brand each piece of tinfoil, but it is sold by the Beech-Nut Packing Co.'s Foil Department.

X-Q. 45. Does the Company sell it under the trade-mark Beech-Nut?

A. I would not say it was under the trade-mark Beech-Nut, but I would say that the trade-mark "Beech-Nut" is on the top of our letterheads.

X-Q. 46. If you wanted to purchase a jar of Beech-Nut Bacon and went to a store and the man handed you a package of Beech-Nut tobacco, would you take it in the place of bacon?

A. No.

Redirect Examination by Mr. Hinton.

Rd-Q. 47. There has been read into the record copy of letter dated July 22, 1919, from Mr. Offield to Mr. W. C. Arkell, which apparently was forwarded by Mr. Bartlett Arkell to the P. Lorillard Co. At the time this correspondence occurred, state whether or not negotiations looking toward a settlement of this controversy were (foreseen)?

A. They were.

Rd-Q. 48. Were the negotiations successful?

A. No, sir.

Rd-Q. 49. If you went into a store and desired to purchase a bottle of Beech-Nut Ginger Ale made by your Company, would you accept in its place mustard, ham, chewing gum or sliced bacon?

A. I certainly would not.

Recross Examination by Mr. Cavanagh.

Rx-Q. 50. Do you know when this controversy over Beech-Nut tobacco between P. Lorillard Co. and the Beech-Nut Packing Co. started?

A. No.

Rx-Q. 51. Do you know that as early as 1915 the Beech-Nut Packing Co. had some correspondence with the P. Lorillard Co. regarding the use by Lorillard Co. of the trade-mark Beech-Nut for tobacco?

A. I understand so.

Rx-Q. 52. Then you knew that for a number of years or until about 1919 there was nothing further done in the matter until the question of its use by the P. Lorillard Co. for trade-mark for cigarettes came up?

A. I would not state nothing was done. I would state that the matter was being considered by at least one person in that place all the time.

Rx-Q. 53. This letter from Mr. Offield to you is dated July 22, 1919. I note that the Beech-Nut trade-mark application involved in this opposition was filed complete June 25, 1919. In the application, the Beech-Nut Packing Co. claimed date of use since June 12, 1919. So approximately about a month or thereabouts prior to the writing of this letter received by you, the Beech-Nut Packing Co. had started to use the trade-mark for cigarettes and had filed an application for such registration for trade-mark "Beech-Nut."

A. I do not recall the dates. If you state so from the official papers, they must be correct.

Cross-examination closed.

Deposition closed.

W. C. ARKELL.

Stipulated by and between the parties hereto, through their respective counsel, that the Exhibits herein may be retained in the custody of the counsel producing the same, subject to production on or before final hearing. These exhibits or copies thereof to be available at all times to opposing counsel.

Stipulated by and between the parties herein, through their respective counsel, that the time the Beech-Nut Packing Co. for taking its testimony may be extended sixty days beyond August 14, 1920, subject to the approval of the Patent Office.

Guy W. Sharpe,

a witness called on behalf of the Beech-Nut Packing Company, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes and says. (Formal notice of this witness being waived.)

Question 1. Your name is Mr. Guy W. Sharpe, you are 35 years of age, residence, Canajoharie, N. Y., you are a member of the Sales Department of the Beech-Nut Packing Co. Is that true?

Answer. That is true.

Q. 2. How long have you been connected with the Beech-Nut Packing Co.?

A. Since April, 1915.

Q. 3. Have you had occasion in your employment by the Beech-Nut Packing Co. to come in intimate contact with trade purchasing products of this Company?

A. I have.

Q. 4. During what period?

A. From April, 1915, until April 28, 1919.

Q. 5. Since then what have you done?

A. I have been connected with the Sales Department.

Q. 6. State whether or not the Beech-Nut Packing Co. has from time to time added to its line of products, new products quite different from previous products sold by the Beech-Nut Packing Co.

A. It has.

Q. 7. Were these products labeled?

A. Yes.

Q. 8. With what label?

A. With the Beech-Nut label.

Q. 9. Is it the label which appears on the exhibit produced by Mr. Lipe?

A. Yes.

Q. 10. Including the red and white border, blue line, oval, picture of beech-nut and the name Beech-Nut hyphenated in blue?

A. It is.

Q. 11. Have you had occasion to investigate the growth of the business of the Beech-Nut Packing Co. prior to your connection with the Company?

A. I have.

Q. 12. Is your statement as to the additions to the line of this Company true during the period prior to your connection with the Company?

A. Yes.

Q. 13. Have you had occasion to come in contact with the Lorillard Scrap Tobacco package as shown in Lorillard Exhibit 16?

A. I have.

Q. 14. Can you state from your knowledge of the trade and public, obtained in actual selling experience,

what the impression has been and is in the minds of the trade and public as to this product?

A. It has been quite generally and is quite generally believed that this product was put out and merchandised by the Beech-Nut Packing Co.

By Mr. Cavanagh: That question and answer is objected to upon the ground it is evident attack to lay foundation for charge of unfair competition and which issue is not involved in procedure of this character.

It is stipulated that this objection may stand as to similar questions along this line put to this witness.

Q. 15. Upon what do you base your answer just given?

A. Upon the conversations with dealers and general public in which the question has been frequently asked whether or not it was a Beech-Nut product, and frequently the admission has been made that they presumed it was a Beech-Nut product.

Direct examination closed.

Cross-Examination by Mr. Cavanagh.

X-Q. 16. I understand you came here in 1915?

A. I came here in 1919.

X-Q. 17. How long have you been connected with the Company?

A. Since April 1, 1915.

X-Q. 18. You say you have made investigations as to the additions of various products to the Beech-Nut line, prior to April 1, 1915?

A. Yes, sir.

X-Q. 19. What was the scope of your investigation and what procedure did you follow in this investigation?

A. Please repeat the question.

X-Q. 20. You say you made an investigation prior to your connection with this firm in 1915?

Mr. Hinton: I think the witness possibly misunderstood the question. I do not understand that he made the investigation prior to 1915, but that during his connection with the Company familiarized himself with the extensions of the Beech-Nut line, which happened before his connection with the Company.

By Mr. Cavanagh: This deposition is being taken in stenographic notes. The stenographer is now requested to turn to her notes and read for the benefit of the witness and counsel for Lorillard Co. that portion of deposition in which the witness refers to the investigation he made.

Stenographer turned to notes and read portion of deposition referred to.

A. General investigation for purpose of familiarizing myself with the business of the Company through the Division Salesman under whose charge I was and through various members of the organization on occasion of visits to the plant.

X-Q. 21. You made the investigation of these matters, which occurred prior to your connection with the firm?

A. Yes.

X-Q. 22. When did the Beech-Nut Co. add Peanut Butter to its list?

A. I could not say.

X-Q. 23. When did it add candy to its list of products?

A. My answer would be rather indefinite as to candy, I think the latter part of 1914 or early part of 1915.

X-Q. 24. What would be your answer as to Catsup?

A. I cannot give a definite answer on any of those as to the dates. It was prior to my connection with the Company.

X-Q. 25. When did they add cigarettes to the line?

A. I cannot say as to that.

X-Q. 26. Did you ever sell Beech-Nut tobacco to the trade?

A. I did not.

X-Q. 27. Did you ever know of the Beech-Nut Packing Co. selling tobacco products to the trade?

A. I never knew of their doing so.

X-Q. 28. Are you familiar with the tobacco trade?

A. Somewhat.

X-Q. 29. Did you ever sell tobacco products?

A. I did not.

X-Q. 30. Did you ever have anybody in the tobacco industry ask you if the Lorillard Beech-Nut Tobacco was put out by the Beech-Nut Packing Co.?

A. Yes, I have.

X-Q. 31. Who asked you that?

A. That is rather a difficult question to answer. I know of one instance, W. A. Riendel, Lansing, Mich.

X-Q. 32. Where does he live?

A. Lansing, Michigan.

X-Q. 33. What line of business was he in?

A. Tobacco.

X-Q. 34. Wholesale or retail?

A. Retail.

X-Q. 35. Was he handling Beech-Nut Tobacco?

A. Yes.

X-Q. 36. Had on sale the Lorillard Beech-Nut Tobacco?

A. Yes.

X-Q. 37. As a tobacco man he asked you if the Beech-Nut Packing Company made that?

A. That is the question he asked me.

X-Q. 38. Were you ever asked that by the United Cigar Stores?

A. I do not think I ever had any conversation about this with the United Cigar Stores.

X-Q. 39. You examined that package, Exhibit 16, have you not?

A. I have.

X-Q. 40. Do you find the word Lorillard printed on?

A. I do.

X-Q. 41. Do you find the phrase, Beech-Nut Packing Co. on it?

A. No, sir.

X-Q. 42. As an intelligent man, if you saw that package with the Lorillard name on it and did not find the Beech-Nut Packing Co.'s name, would you think the Beech-Nut Packing Co. made it?

A. I would not.

X-Q. 43. Referring to charts which were produced by Mr. Lipe and which shows the labels of the various Beech-Nut products, as I understand it you do not know the particular date upon which any of those products were first put out by the Beech-Nut Packing Co.

A. I could not give you the dates.

X-Q. 44. If you went into a store to purchase one of the products indicated by the labels on this chart, would

you permit the leader to sell you Lorillard Beech-Nut Tobacco in place of such products?

A. Certainly not.

X-Q. 45. So you would not make the mistake in taking tobacco for any of those products?

A. No, sir.

Mr. Hinton.

Rd-Q. 46. Mr. Cavanaugh asked whether if you went into a store to purchase any one of the products on the collection of labels produced by Mr. Lipe, would you accept a package of scrap tobacco in its place and you answered you would not.

I ask if you went into a store for the purpose of purchasing any one of the products, such, for instance, as sliced bacon which labels are displayed in this collection, would you accept in its place any of the other products, such as Cranberry Sauce?

A. I would not.

Cross examination closed.

Deposition closed.

GUY W. SHARPE.

It is stipulated by and between counsel for the parties hereto, through their respective counsel, that the invoice from the American Tobacco Co. to the Beech-Nut Packing Co., dated July 12, 1919, order No. 19122 and shipped from Kinney Duke Branch reads in essential parts as follows:

Entered 7/11, Order of 7/11

	<i>Gro.</i>	<i>Price.</i>	<i>Total.</i>
2060 Beech-Nut			
Cigarettes 10s.....	2060	5.75M	11.85
			net cash

Shipped to the following:

B. Arkell, Equitable Bldg.,
120 Broadway, New York.

James R. Offield,
1223 Monadnock Bldg.,
Chicago, Ill.

New Jersey Tobacco Co., Jersey City Branch,
Jersey City, N. J.

Production of the original invoice in evidence
was waived.

Statement of advertising appropriation referred to by Mr. Lipe in his testimony is produced by Mr. Lipe and it is stipulated that it may be incorporated in the records.

1910	\$70,986.37
1911	89,936.01
1912	138,463.18
1913	130,333.91
1914	148,258.85
1915	206,415.53
1916	299,976.60
1917	366,227.04
1918	308,224.72
1919	433,724.98

IN THE UNITED STATES PATENT OFFICE.

P. LORILLARD COMPANY	} Trade-Mark Oppo-	
<i>vs.</i>		sition No. 2805.
BEECH-NUT PACKING COMPANY.		
"Beech-Nut."		

STATE OF NEW YORK, }
County of Montgomery, } *ss.*

Notary's Certificate.

I, Fred. M. Geortner, a Notary Public, in and for the County of Montgomery, State of New York, do hereby certify that the foregoing depositions of Walter H. Lipe, Thomas Lynch, Clarence Lindholm, J. Wesley Wood, W. C. Arkell and Guy W. Sharpe were taken on behalf of Beech-Nut Packing Company pursuant to agreement and by consent, before me, at Canajoharie, County of Montgomery and State of New York, on the 3rd and 4th days of August, 1920; that the witnesses were by me each duly sworn; that the testimony of each witness was taken, in my presence, in shorthand by Miss M. Therese Kane, and by her reduced to typewriting; that the foregoing pages contain a true and accurate transcript of her stenographic notes; that the opposing parties were represented by counsel during the taking of said testimony; that said testimony was taken at Canajoharie, New York, and was commenced at 2 o'clock on the 3rd day of August, 1920, and was concluded on the next day at about 2 o'clock

P. M.; that the deposition of each witness was read to or by such witness before the witness signed the same; that I am not connected by blood or marriage with either of said parties, or interested directly or indirectly in the matter in controversy.

In testimony whereof I have hereunto set my hand and affixed my seal of office at Canajoharie, County of Montgomery, State of New York, this 25th day of August, 1920.

FRED. M. GEORTNER,
Notary Public.

[SEAL.]

IN THE UNITED STATES PATENT OFFICE.

P. LORILLARD COMPANY	} Trade-Mark Oppo-
<i>vs.</i>	
BEECH-NUT PACKING COMPANY.	
Beech-Nut.	
}	
} sition No. 2805.	

Notice.

Meyers, Cavanagh & Hyde,
200 Fifth Ave., New York, N. Y.

Gentlemen: Please take notice that on Thursday, December 16, 1920, we shall proceed to take the testimony in the above entitled case, pursuant to the rules and statutes in such case made and provided, at the office of Offield, Poole & Hinton, Room 1737, 38 S. Dearborn Street, Chicago, Illinois, beginning at 12:30 A. M. The following witnesses will be examined.

S. W. Billepp
H. F. Stickney

R. S. Yunker
 Joseph Fleming
 Mrs. Matilda Wedel
 Walter Peabody
 Louis Nernberg
 and perhaps others.

All of the witnesses reside in Chicago, Illinois.

OFFIELD, POOLE & HINTON,
Counsel for Beech-Nut Packing Co.

Due and timely service of the above notice acknowledged
 this 16th day of Dec., 1920.

MEYERS, CAVANAGH & HYDE,
Attorneys for Lorillard Co.

IN THE UNITED STATES PATENT OFFICE.

P. LORILLARD COMPANY	} Trade-Mark Oppo-
^{vs.}	
BEECH-NUT PACKING COMPANY.	} sition No. 2805.

"Beech Nut."

Depositions of Witnesses.

Testimony taken on behalf of Beech-Nut Packing Company at the office of Offield, Poole & Hinton, 1737-38 S. Dearborn Street, Chicago, Illinois, and 1143 E. 55th Street, Chicago, Illinois, beginning December 16, 1920, at 2:00 P. M. before Sarah E. Harvey, a Notary Public, acting as special examiner by consent.

Present: Sebastian Hinton for Beech-Nut Packing Company, Richard B. Cavanagh for P. Lorillard Company.

Mrs. Matilda Wedel,

a witness called on behalf of the Beech-Nut Packing Company, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes and says:—

Question 1. Please state your name, residence and occupation.

Answer. My name is Matilda Wedel, 3312 N. Leavitt Street. My business is in the cigar business. I own the business.

Q. 2. Where is your cigar business located?

A. Monroe Building. Monroe and Michigan. Large office building. Contains sixteen floors.

Q. 3. How long have you conducted the cigar stand in the Monroe Building?

A. Four years in April.

Q. 4. Do you employ any assistance in running that cigar business?

A. Two people work in the stand. One relieves.

Q. 5. I show you a package of chewing tobacco, which is a duplicate of a package in evidence in this case as Lorillard Exhibit 16, and ask if you handle this product in your cigar stand?

A. I have handled it until the last two months. I am not handling it now. I am too busy. It dries out. When a man comes in and says, "Ain't you got Beech-Nut Scrap." I say I haven't it now. If you want it now, I will get it for you. I have had it all the time.

Q. 6. How long have you handled Beech-Nut Scrap tobacco?

A. Four years. I have had Beech Nut Scrap Tobacco all the time, where I don't have other tobacco.

Q. 7. Will you tell me whether you now know who makes Beech Nut Scrap?

A. I know its made by Lorillard now.

Q. 8. How long have you known it was made by the Lorillard Company?

A. Since one week ago.

Q. 9. By whom were you first advised that this tobacco was made by the Lorillard Company?

A. The salesman Mr. Lewis came in with another man. He was connected with the Beech-Nut concern also. I don't try to remember names. He was talking about Beech-Nut cigars. I said something about the Beech-Nut tobacco, and he says, "Well, you think that Beech-Nut tobacco is made by the same concern?" (I was saying how good it was.) I said yes, I thought so. And he says, "Well, what makes you think so." Well, because it has the same trade-mark, the same oval mark. I have heard different remarks, but I couldn't mention names, because I never gave it a thought. For years I have heard that.

Mr. Cavanagh: Last part of question is objected to as hearsay.

Q. 10. Do I understand you to say that for years you have heard customers * * *?

A. Often. We talked about Beech-Nut. "Everything is good about Beech-Nut." "Even Beech-Nut Scrap is good." "Do you think they make it." I said "Yes." "Sure." "I guess so."

Q. 11. By whom do mean when you say "they"?

A. The Beech-Nut Products.

Q. 12. Do you mean the same people who make other Beech Nut products?

A. Yes. Not Lorillard. Didn't know that until a week ago.

Q. 13. Do I understand you to say that you were first advised that the Beech-Nut Company did not make Beech Nut Scrap Tobacco, by a Beech-Nut Packing Company representative about a week ago?

A. Yes.

Q. 14. And until that time you believed it was a product of the Beech-Nut Packing Company?

A. I did.

Q. 15. What other products of the Beech-Nut Packing Company do you handle, Mrs. Wedel?

A. I handle. * * * To specialize the items—all their mint products and all their products like lemon and sour drops, I would call it. That's all there are.

Q. 16. Do you handle chewing gum?

A. Oh! yes.

Q. 17. What made you believe that Beech Nut Scrap Tobacco was made by the Beech-Nut Packing Company?

A. Again I will say, it was the same label, the same trade-mark, their oval stamp, and the later ones that they have on cough drops. They even have a narrow striped cough drop—blue, and this is red.

Q. 18. You mean that the Beech-Nut Packing Company has this same label on all their products.

A. Yes. And the Horehound drops.

Q. 19. But do you mean that the oval label appears on other Beech-Nut Packing Company products?

A. On all products, they have their label, their oval label. On all I have seen. Mints and sour drops I have stated I have handled and also that tobacco.

Q. 20. What is the standing of the Beech-Nut Packing Company's products, which you have described, in the public mind? Do you know?

A. I don't just understand.

Q. 21. What does the public think of products with that label on it?

A. There are loads more like myself, as I make the statement. I have had that same thought brought to me over the counter, and I haven't been in business to handle Beech-Nut, and never thought of it, until somebody made the remark to me, and when I handled Beech-Nut tobacco I saw it had the same label as the gum. The gum was the first item I handled and Beech Nut Scrap tobacco was the second I handled. Until I handled those two I was so sure they were together.

Q. 22. Do you know whether or not the public regards with favor any product bearing the oval Beech-Nut label?

A. Whether they prefer the oval Beech-Nut label? They would have it sooner than anything. Some are skeptical about other things. When I take Beech-Nut and say, I have not Life Savers, but this is far superior. I can say that. I just know that of myself.

Q. 23. When customers, however, asked you about the Beech Nut Scrap Tobacco, by whom have you told them it was made?

A. We never had that discussed. It was just an off-hand way.

Mr. Hinton: Direct examination closed.

Cross-Examination by Mr. Cavanagh.

X-Q. 1. What did you say is your line of business?

A. I am in the cigar business and light candy. Packaged.

X-Q. 2. Do you own the business?

A. Yes, sir.

X-Q. 3. Buy goods yourself?

A. Yes, sir.

X-Q. 4. From whom did you buy your Beech Nut Tobacco?

A. From Thorwart & Roehling. Somewhere on Lake Street.

X-Q. 5. Do you know where located?

A. On Lake Street somewhere.

X-Q. 6. In what quantities did you buy that tobacco?

A. Every week. One dozen packages just like that.

X-Q. 7. I presume that you can read?

A. Yes.

X-Q. 8. What is the name on that package?

A. Lorillard.

X-Q. 9. Do you find the name Beech-Nut Packing Company on that package?

A. Not at all. If I had ever stopped to read, I would have never said this was Beech-Nut Packing Company's product.

X-Q. 10. If you had stopped to read the package you would never have said it was Beech-Nut Company's?

A. No.

X-Q. 11. What brands of cigarettes do you handle?

A. All popular brands. Means most established.

X-Q. 12. Do you handle Murad?

A. All. All of Lorillard.

X-Q. 13. You know Lorillard is a good tobacco concern?

A. Yes, sir.

X-Q. 14. If you had ever taken the slightest trouble to examine that package you would have connected it with the Lorillard Company?

A. Yes, sir. Lorillard.

X-Q. 15. And a good responsible concern?

A. Yes, I would say that. Until now I have never seen that Lorillard.

X-Q. 16. Never took trouble to look for it?

A. No. It was scrap tobacco. We only notice those things as what the people ask for. We get it from a jobber. If we were dealing with the people direct, like with Beech-Nut people, then we would know what people made the goods.

X-Q. 17. You handle lots of Lorillard tobacco products, do you not? How do you know that goods like Murad or Mogul are Lorillard?

A. A salesman comes in. They say, I am the Murad man from P. Lorillard. I am salesman. Or I am manager, and once in a while he will leave a sample package of cigarettes. I thank him and he may have an order and he may not.

X-Q. 18. Now. On this Beech Nut Tobacco. I understand it is the only scrap tobacco that you sold?

A. At the present time. Within the last six months.

X-Q. 20. You never bought any direct from Lorillard? Only from some jobber?

A. Yes. Before I go any further. All cigarettes are handled through a jobber that I buy.

X-Q. 21. You were speaking about a horehound package and you said it had some lines on it. What did you mean?

A. It is a long package. Did you see their lemon drops?

X-Q. 22. No.

A. Long package three-fourths ($\frac{3}{4}$) inch in diameter. About three to three and one-half inches long. It has blue instead of red. I don't know whether they come wider. Straight lines.

X-Q. 23. As you are in the candy and tobacco business, if a customer came in to you and wanted to buy some Beech Nut Tobacco, would you be so confused as to sell him that horehound candy package for this Beech Nut tobacco package.

A. No. I would say to him "Beech Nut Scrap"? or something like that.

X-Q. 24. Wouldn't be confused into selling Beech-Nut candy?

A. He wouldn't take it. I wouldn't give it to him. If I had known it made such a difference, I would have noticed the name.

X-Q. 25. Can you tell me whether the oval on this Beech Nut package of tobacco is like or different from the oval on the chewing gum?

A. They have same label all over on Beech-Nut goods.

X-Q. 26. Would you say that this particular oval is exactly like or different?

A. Not exactly like. But at a slight glance, a person not noticing the name and handling it for years would think it was the same. That oval circle there or trademark.

X-Q. 27. The only Beech-Nut products you handle are candy?

A. Yes. In the name of Beech-Nut.

X-Q. 28. Who do you buy your Beech-Nut candy products from?

A. I buy them direct and jobbing.

X-Q. 29. You buy some direct from Beech-Nut Packing Company?

A. Yes. And some from a jobber. Jobber handles *candy, gum and other things.*

X-Q. 30. You never ordered any tobacco from the Beech-Nut Packing Company?

A. No. Tobacco and cigars are ordered through a jobber. By one jobber. By the cigar jobber.

X-Q. 31. You never ordered any Beech-Nut tobacco from Beech-Nut Packing Company?

A. Never.

X-Q. 32. You do not order Beech-Nut tobacco from the same man as you order Beech-Nut candy from.

A. No. But they handle the gum.

X-Q. 33. Which jobbers?

A. Thorwart & Roehling, that I order my cigars from. A jobber that handles cigars, handles all tobaccos, all cigars, and handles candy, and mints and gums, sometimes. I am not saying that these people always have them, but I have gotten them from them.

X-Q. 34. What kind of jobbing business are they in?

A. Cigar jobbing.

X-Q. 35. Exclusively tobacco jobbing?

A. Yes.

X-Q. 36. I thought you said they handled gum?

A. I can get it there.

X-Q. 37. What else do they handle besides tobacco?

A. Certain brands of cigars that they are distributors for. All brands of cigars—if they haven't got them, they will get them for you. All tobaccos, smoking and chewing. That's all that I know that's in my mind, and gum. I told you that before. That's what I can buy from them.

X-Q. 38. You buy your Beech-Nut gum from those people?

A. Wherever I can get it.

X-Q. 39. Then where did you get it?

A. When the market is scarce on Beech-Nut goods, like last two years, we had to buy it where we could get it.

X-Q. 40. If you ordered from this jobber one dozen packages of Beech Nut Tobacco, and he sent you one dozen packages of Beech-Nut Gum, what would you say?

A. I would say I didn't want them and send them back.

X-Q. 41. You wouldn't possibly confuse the two.

A. I wouldn't make a mistake. Might be mistake on the order, but I couldn't make a mistake.

Mr. Cavanagh: That's all.

Redirect Examination by Mr. Hinton.

Rd-Q. 1. Do your customers, Mrs. Wedel, ever come in and say "Give me a package of Beech-Nut?"

A. Yes.

Rd-Q. 2. And what do you give them?

A. Gum.

Recross Examination by Mr. Cavanagh.

Rx-Q. 1. Suppose he is a big, strong, rough-looking, healthy man, who comes in to your place, weighing two hundred pounds, chewing a wad of tobacco, and he takes it out of his mouth, throws it on the floor, and says "Give me some Beech Nut." What would you give him?

A. I would give him gum.

Rx-Q. 2. You would give that big longshoreman gum?

A. Scrap tobacco is only used by working class and they are not customers in the building. I am handling it for the people in the building.

Rx-Q. 3. But did I ask you that? I asked you, if a big, longshoreman, weighing two hundred pounds comes in chewing Beech Nut, would you hand him gum?

A. Yes. He had to say Scrap.

Rx-Q. 4. Suppose he said tobacco. He would get tobacco?

A. Yes.

Rx-Q. 5. This package?

A. Yes.

Rx-Q. 6. If he asked for tobacco, you wouldn't give him gum?

A. No.

Rx-Q. 7. You would disregard all other Beech-Nut products?

A. Yes. Unless he says what he wants, Beech-Nut gum was on the market before anything I know of.

Rx-Q. 8. Do you know how long Beech-Nut gum has been on the market?

A. No.

Recross examination closed.

MATHILDA WEDEL.

R. J. Yunkers,

a witness called on behalf of the Beech-Nut Packing Company, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes and says:

Question 1. Please state your name, age, residence and occupation.

Answer. Roy J. Yunkers, 6156 Kenwood Ave., Chicago, occupation retail cigar salesman.

Q. 2. You are the manager of the Albert Breitung Store, at 409 S. Dearborn Street, Chicago?

A. Yes, sir.

Q. 3. Is this a down-town store?

A. Loop store.

Q. 4. Is it in Old Colony Building?

A. Yes, sir.

Q. 5. The Old Colony Building is a large down-town Chicago business building?

A. Yes, sir.

Q. 6. How many employees work in the store of which you are manager?

A. Myself mostly. Extra man during holidays.

Q. 7. How long have you been selling tobacco over the counter?

A. About twelve years.

Q. 8. Has the Albert Breitung Company other Chicago stores?

A. Yes, sir.

Q. 9. How many other stores?

A. Twelve. All in the loop.

Q. 10. I show you a package which is a duplicate of opposer's Exhibit No. 16, Beech Nut Scrap Tobacco. Have you sold this product over the counter?

A. I have.

Q. 11. For how long?

A. Four or five years, I would say.

Q. 12. Did you ever chew this product yourself?

A. I have chewed it.

Q. 13. To what extent have you sold this product over the counter? I mean has it been a big seller?

A. It has been a big seller.

Q. 14. Do you now know who makes this product?

A. Well, I wouldn't say for sure. I understood it was Beech-Nut people. I always understood it was the Beech-Nut people.

Q. 15. When did you first receive information to the effect that this might not be a product of the Beech-Nut Packing Company?

A. About two weeks ago. One of the salesmen of the Beech-Nut people.

Q. 16. I understand you to say that the first time you received information that this product might not be a product of the Beech-Nut Packing Company came from a Beech-Nut Packing Company salesman about two weeks ago?

A. Yes, sir.

Q. 17. What led you to believe prior to that time that this was a product of the Beech-Nut Packing Company?

A. The trade-mark or label of the package looked the same as any other package the Beech-Nut people put out.

Q. 18. From your experience in dealing with the public over the counter, what would you say as to what the public believes on the question of who makes this product?

A. I had quite a number of times customers coming in and wanting to know if Beech-Nut people were going

into the tobacco business—if tobacco was put up by the Beech-Nut people. I always told them yes.

Q. 20. You have testified that the label on this package of tobacco is like the label on Beech-Nut products.

A. Yes, sir.

Q. 21. Is the label on Beech-Nut products well known to the public?

A. Yes, sir. Very well known.

Q. 22. And for how long has it to your knowledge been well known to the public?

A. As long as I have been in the game behind the counter. Maybe longer than that. You cannot sell anything but Beech-Nut.

Q. 23. What products would that be true of?

A. The gum, the candy, which I mostly handle. Lime drops.

Q. 24. How long after the first appearance of the Beech-Nut gum was it before this gum became popular?

A. Well, I cannot say to that. It seemed to come on here about five or six years ago. I notice it more than anything on gum. Couldn't get gum. Couldn't sell any other gum. They would walk away.

Q. 25. What was the name of the Beech-Nut Packing Company salesman who advised you first that this product Beech Nut tobacco was not made by the Beech-Nut Packing Company?

A. Mr. Lewis.

Q. 26. Is he Chicago representative of the Beech-Nut Packing Company?

A. Yes, sir.

Q. 27. State whether or not chewing gum is sold in tobacco stores generally.

A. Chewing gum is sold in tobacco stores, in department stores, in drug stores. Anybody that can handle gum sells Beech-Nut.

Q. 28. State whether or not what you have referred to as the trade-mark or label of the Beech-Nut gum is like the badge or label on Beech Nut tobacco.

A. The oval shape on the Beech Nut gum, the label is always oval. The tobacco is oval shape. I was under the impression that both were the same.

Q. 29. When a customer comes into your store and asks for Beech-nut, what do you give him?

A. Lots of times, if he looks rough, I ask him if he wants tobacco or gum or candy. If you give him gum, he says he wants tobacco. I have that happen to me many times. Sometimes in morning rush, you could stand and notice it.

Direct examination closed.

~~EXHIBIT~~

Cross-Examination by Mr. Cavanagh.

Cross-question 1. How long have you been in the tobacco business?

Answer. Twelve years.

X-Q. 2. Can you name some of the large tobacco manufacturers? Big concerns?

A. Liggett & Myers, Lorillard, American Tobacco Company, Reynolds.

X-Q. 3. I show you this package. Exhibit 16, and ask you if you can read that name?

A. Lorillard. Yes, sir.

X-Q. 4. Whose tobacco would you take that to be from that package?

A. I would take it to be Lorillard's tobacco.

X-Q. 5. You do not find the word Beech-Nut Packing Company any place on that package?

A. No, sir.

X-Q. 6. And you know that Lorillard is a large and reputable manufacturer of tobacco?

A. Yes, sir.

X-Q. 7. Have you a very good standing in the trade?

A. Very good.

X-Q. 8. If a man asked you whose tobacco that was, if you took time to even look at it you would say it was Lorillard?

A. Yes, sir.

X-Q. 9. You would immediately connect the name with such cigarettes as Murad, Mogul, Egyptian Dieties, and Climax chewing tobacco?

A. Yes, sir.

X-Q. 10. If a customer came into your store and asked you for a package of Beech-Nut tobacco would you give him a package of chewing gum?

A. Not if he asked for tobacco. A lot come in and ask for Beech Nut. Not if they ask for tobacco.

X-Q. 11. Wouldn't confuse it with candy?

A. No, sir.

X-Q. 12. And you would hand him this package or package like this, which I understand you keep in stock, and if you had ever taken the trouble to read name, you would have known it was manufactured by Lorillard?

A. Yes, sir.

X-Q. 13. You never took the trouble to examine the package?

A. No, sir.

X-Q. 14. Never had examined the package?

A. No, sir; I haven't. So many customers come into store and ask for Beech Nut. I heard lot of remarks. I asked Mr. Lewis two weeks ago. I said I had

heard remarks passed by lots of people. I have been behind the counter for a long time. Never paid much attention to the package.

X-Q. 15. Do you buy the supplies in your store or are they delivered from other stores?

A. Delivered. Sometimes from wholesale and sometimes from J. B. Moos, wholesale jobber in city.

X-Q. 16. Where is Moos place?

A. On West Randolph Street, Washington Street.

X-Q. 17. Do you know how tobacco comes billed?

A. No. Never see that at all.

X-Q. 18. If you were asked if this were made by Beech-Nut Packing Company * * * *?

A. If I looked closely, I would say "No." I never gave it a thought. I just guessed at it. Never looked at the package. Never examined it closely.

X-Q. 19. Never took the trouble to find out whose tobacco it was?

A. I can't hardly say that. I may have known that it was Lorillard at one time way back. Never gave it a thought. Have too many other things on my mind to think about.

X-Q. 20. What is the color of the Beech-Nut oval on its chewing gum and candy products?

A. Well, on the products, it is dark center, of dark blue. The gum has gold band around it. Some have darker band.

X-Q. 21. Do they have these red radiating lines on it?

A. No, sir.

Redirect Examination by Mr. Hinton.

Redirect Question 1. Do I understand you to say that you have actually handed out this package to customers many times in the course of your selling experience?

Answer. Yes.

Rd-Q. 2. In other words, you have taken the package off the shelf and given it to the customers when they asked for it in the ordinary way.

A. Yes, sir.

Rd-Q. 3. You have done this very many times?

A. Quite a number of times.

RAY J. YUNKER.

Joseph Fleming,

a witness called on behalf of the Beech-Nut Packing Company, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes and says:

Question 1. Please state your name, age, residence and occupation.

Answer. Joseph Fleming, 51 this month, residence 6645 Yale Avenue, Chicago, grocer.

Q. 2. Where is your grocery store located?

A. 1833 W. 103 St.

Q. 3. How long have you been in the grocery business?

A. All told, over thirty years.

Q. 4. Are you one of the proprietors of the store at the address you gave?

A. I am.

Q. 5. Have you in the course of conducting the grocery store handled products of the Beech-Nut Packing Company?

A. I have.

Q. 6. For how long?

A. For twelve or thirteen years anyhow. Maybe more.

Q. 7. Could you give me from your memory a complete list of all the products the Beech-Nut Products Company puts out?

A. Beech-Nut Peanut Butter, Beech-Nut Catsup, Baked Beans, Chili Sauce, Beech Nut Jellies.

Q. 8. Could you give a complete list or could you not?

A. That is just some we have in the store.

Q. 9. The question was, could you give a complete list of all the products made by the Beech-Nut Packing Company from memory—could you or could you not?

A. No. I don't think I could.

Q. 10. In other words, the Beech-Nut Packing Company makes products which you could not mention off-hand?

A. No.

Q. 11. How would you tell from examination of the product whether or not it was made by Beech-Nut Packing Company?

A. Naturally the first thing is "Beech-Nut."

Q. 12. Have you seen in the course of your experience from time to time new products come out with the Beech-Nut Company's label on them?

A. Yes. Sure.

Q. 13. Have these products been different from every preceding products, which bore the same label?

A. They have.

Q. 14. How have such products, although new, been received by the public?

A. My experience has been that the Beech-Nut was that when they had an article that suited them with the name Beech-Nut on it, it impressed the public very satisfactorily. That is, they buy without very much recom-

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mentation just because Beech-Nut was on it. I know from my standpoint, not the public, that it is easier to sell a Beech-Nut article that has given satisfaction.

Q. 15. What does the Beech-Nut label stand for in the mind of the public?

A. First quality goods. Purity of goods.

Q. 16. How long as the Beech-Nut label been displayed to and before the public?

A. Twelve or thirteen or fourteen years. Has been added to very extensively since that time. Other lines.

Q. 17. I show you a package, a duplicate of which is in evidence as opposer's Exhibit No. 16, and ask you whose product you thought this was when you first saw it?

A. Beech-Nut.

Q. 18. You mean the product of the Beech-Nut Packing Company?

A. I do. My very first impression.

Q. 19. Why did you think it was their product? The product of the Beech-Nut Packing Company?

A. Advertisement there is so much similar to the Beech-Nut. First thing that came to my mind.

Q. 20. From your contact daily over the counter with customers, what can you say as to what the public would think in that respect?

Mr. Cavanagh: Objected to as calling for an opinion.

A. I believe the public would think just as I have. They would say it was a Beech-Nut product.

Direct examination closed.

Cross-Examination by Mr. Cavanagh.

X-Q. 1. Do you sell Beech Nut tobacco?

A. No.

X-Q. 2. Ever sold any of it?

A. No.

X-Q. 3. Do you know of the Lorillard Company?

A. I do not.

X-Q. 4. You do not handle tobacco at all?

A. No.

X-Q. 5. Ever handle it?

A. No.

X-Q. 6. Would you look at that package which Mr. Hinton has called your attention to. Do you find the name Lorillard on it?

A. Yes.

X-Q. 7. Do you find the name Beech Nut Packing Company on it?

A. No.

X-Q. 8. Did you ever see a Beech-Nut Packing Company package with red radiating stripes of varying width as shown there?

A. No.

X-Q. 9. If a man came into your grocery store and asked you for a package of Beech Nut tobacco, would you sell him preserves or Beech-Nut Peanut Butter, or candy, or chewing gum for the Beech-Nut tobacco.

A. I wouldn't sell it because I did not handle it.

X-Q. 10. Would you confuse Beech-Nut tobacco with a Beech-Nut can of Peanut Butter?

A. No. If we were handling it he would get Beech Nut tobacco.

X-Q. 11. Would not hand him Beech Nut Peanut Butter for tobacco.

A. No.

X-Q. 12. There would be no confusion in your mind as to the kind of goods?

A. No. Of course not.

X-Q. 13. You wouldn't have a bit of difficulty in distinguishing tobacco from grocery line you spoke of?

A. No.

Redirect Examination by Mr. Hinton.

Rd-Q. 1. I understand you to say that if a man came into your store and asked you for a bottle of catsup, you would not give him a can of beans?

A. No.

Rd-Q. 2. If a man came into your store and asked you for any one of the Beech-Nut Packing Company's line, would you give him any other one?

A. Certainly not.

Recross Examination by Mr. Cavanagh.

Rx-Q. 1. When did you first see that package of tobacco?

A. About three weeks ago?

Rx-Q. 2. You had never seen Beech Nut tobacco before it?

A. No.

Rx-Q. 3. Do you smoke?

A. No.

Rx-Q. 4. Do not use tobacco in any form?

A. Never have.

Recross examination closed.

JOSEPH FLEMING.

Walter Peabody,

a witness called on behalf of the Beech-Nut Packing Company first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes and says:—

Question 1. Please state your name, age, residence and occupation.

Answer. Walter Peabody, 28; 7144 Emerald Avenue; grocery clerk.

Q. 2. How long have you been in the grocery business?

A. In and out of the grocery business, out for two and one half years, in for the last six years.

Q. 3. Out during war period?

A. Yes.

Q. 4. Do you smoke?

A. Surely.

Q. 5. How long have you smoked?

A. Say ten years.

Q. 6. Are you familiar with the product Beech-Nut Scrap Tobacco?

A. I have seen it. I do not use it.

Package shown to witness is a duplicate of Opposer's Exhibit No. 16.

Q. 7. Do you know now who makes it?

A. I know now.

Q. 8. How long have you known?

A. About a week.

Q. 9. By whom were you told?

A. By Mr. Lewis of Beech-Nut Packing Company and you.

Q. 10. How long have you been familiar with that product?

A. I remember it coming out I should judge three years ago—four years ago.

Q. 11. By whom did you think this product was made before Mr. Lewis told you?

A. By Beech-Nut Packing Company.

Q. 12. What made you think that?

A. I had several occasions. One time when I was down here in a cigar store, a man was trimming a window for Beech-Nut, and knowing Mr. Lewis, I asked him if Mr. Lewis was still with the firm. And he said yes, and spoke like he knew him very well—he is a good fellow and everything. Then I asked him how long they had been putting up this tobacco. Thought it was product of the Beech-Nut Packing Company. He didn't make any definite answer, so I went away thinking it was naturally a Beech-Nut product put up by Beech-Nut Packing Company.

Q. 13. Mr. Lewis is a salesman for the Beech-Nut Packing Company, is he not?

A. Yes, sir.

Q. 14. How does the label on the package of scrap tobacco compare with the standard Beech-Nut label?

A. Well, after you make a close examination of it, it isn't quite like it. But I never gave it a second thought. It has an oval label. Never gave it a second thought.

Q. 15. What does the Beech-Nut Packing Company's standard label stand for in the minds of the public?

A. Don't hardly know what you mean.

Q. 16. Is it well received by the public?

A. Anywhere you mention Beech-Nut, it is high grade article.

Q. 17. Have you in your experience seen new products come out from time to time, put out by Beech Nut Packing Company and marked with its standard label.

A. Yes.

Q. 18. How have such products been received by the public when offered?

A. Very good. No more than two weeks ago put spaghetti and macaroni on market. It is moving.

Q. 19. Did you ever hear any comment in this store about Beech Nut tobacco?

A. Yes, I have. Just one instance I remember. May be more. Just last week a man walked in here previous to time Mr. Lewis was out here, I had this picture of the Xmas basket.

Q. 20. Beech Nut basket.

A. Yes. "I see Beech-Nut is going into the packing game quite extensively." I said I never knew that they put up anything besides lozenges and Beech-Nut tobacco.

Q. 21. He was a customer or salesman?

A. I don't quite know who it was. We were talking about Beech Nut goods. Wasn't Beech-Nut salesman. Salesman from some other house or customer.

Direct examination closed.

Cross-Examination by Mr. Cavanagh.

X-Q. 1. You don't know the name of the man that made that statement?

A. No, sir. I don't remember who he was. Man walked in here.

X-Q. 2. What was name of man you spoke to that was decorating the window?

A. I don't know. Can tell you where he is. He is driving Ford machine.

X-Q. 3. Don't know his name?

A. Not acquainted with him at all.

X-Q. 4. You smoke?

A. Yes, sir.

X-Q. 5. Do you use cigarettes?

A. Only.

X-Q. 6. Do you know of the Murad cigarette?

A. Yes, sir.

X-Q. 7. The Mogul.

A. Yes, sir.

X-Q. 8. And the Egyptian Diety?

A. Yes, sir.

X-Q. 9. Whose cigarettes are they?

A. I don't know that. I don't even know who puts out the cigarette I smoke.

X-Q. 10. Did you ever hear of P. Lorillard Tobacco Company?

A. No, sir. Never in my life.

X-Q. 11. Would you look at this package, which is like Exhibit No. 16, and tell me what name is on it.

A. Lorillard.

X-Q. 12. Do you find the name of the Beech-Nut Packing Company on it?

A. No, sir.

X-Q. 13. Did you ever know of any Beech-Nut products to have these red radiating lines on them?

A. No, sir.

X-Q. 14. As one engaged in the grocery business, if I came into your store and asked you for a package of Beech Nut tobacco would you sell me a Beech-Nut ham, or a Beech-Nut package of Peanut Butter or Beech-Nut candy?

A. Why no.

X-Q. 15. You wouldn't confuse the goods?

A. Why, no. If anyone asked for Beech Nut Chili Sauce, I wouldn't sell him Peanut Butter.

X-Q. 16. You wouldn't sell him tobacco?

A. No, sir.

X-Q. 17. You would think a man who would take Beech-Nut Chili Sauce for tobacco crazy, wouldn't you?

A. Yes, sir.

Redirect Examination by Mr. Hinton.

Rd-Q. 1. Do you sell chewing gum in this store?

A. No, sir.

Rd-Q. 2. If a man asked you for any Beech-Nut product, would you give him some other Beech-Nut product?

A. In regards to what?

Rd-Q. 3. Well, for instance if a man asked you for Beech-Nut marmalade, would you give him Beech Nut gum?

A. No, sir. I would explain to him that we didn't handle either of them here. We have been out of chili sauce and couldn't get ahold of it. They asked for Beech-Nut Chili Sauce. "I am out of it." "I have the catsup." Lots say "Give me the catsup." Nearly alike. Catsup and Chili Sauce, are about same. One is seasoned a little more.

Rd-Q. 4. You wouldn't offer her Beech-Nut ham in place of Chili Sauce?

A. No.

Recross Examination by Mr. Cavanagh.

Rx-Q. 1. The Beech-Nut products you sell here are in the grocery line and not tobacco line?

A. Yes, sir.

Rx-Q. 2. Those are two distinct lines of business?

A. Yes, sir.

WALTER PEABODY.

Ludwig Nurnberg,

a witness called on behalf of the Beech-Nut Packing Company, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes and says:

Question 1. Please state your name, age, residence and occupation.

Answer. Ludwig Nurnberg, 5507 University Ave., grocery man.

Q. 2. You are the proprietor of the Busy Bee Grocery located at 1143 E. 55th Street?

A. Yes, sir.

Q. 3. How long have you been in the grocery business altogether?

A. Since 1895.

Q. 4. How long have you been proprietor of the Busy Bee?

A. 10½ years. 11 in April.

Q. 5. Have you dealt in the product of the Beech-Nut Packing Company?

A. Sure.

Q. 6. How long have you dealt in the product of the Beech-Nut Packing Company?

A. I should judge at least fifteen years, if not more. Fifteen anyhow. I used to sell them where I was working.

Q. 7. What sort of a reputation has the Beech-Nut Packing Company?

A. Quality.

Q. 8. I show you a package which is a duplicate of opposer's Exhibit No. 16. When you first saw this package, by whom did you think this product was made?

A. Naturally Beech-Nut Packing Company.

Q. 9. What made you think that this was made by Beech-Nut Packing Company?

A. The trade-mark. Are these supposed to be Beech-Nuts? I suppose so. Beech Nut is that same thing. (Witness picks up package).

Q. 10. Had you ever seen this package before it was shown you?

A. Once when you was here. That was first time.

Q. 11. Mr. Lewis showed you that package?

A. Yes. Yes.

Q. 12. Mr. Nurnberg, could you recite a list of all the products the Beech-Nut Packing Company makes?

A. Pretty near all. According to what I handle. What I don't handle now, I have handled.

Q. 13. Has it been your experience that the Beech-Nut Packing Company from time to time comes out with new products different from preceding products?

A. Certainly.

Q. 14. And how does the public receive these new products?

A. In general, with favor.

Q. 15. How are the goods of the Beech-Nut Packing Company marked? Do they all have the same style of label?

A. Yes. The oval part, yes. The trade-mark "Beech-Nut," yes.

Q. 16. Do I understand that the rest of the wrapper may be different in different packages?

A. Yes. The label is most always the same, as far as I know.

Q. 17. Do you handle chewing gum in this store?

A. No.

Q. 18. What stores handle chewing gum?

A. Drug stores, billiard rooms, candy shops; I guess that's about all.

Q. 19. Do you smoke?

A. Yes, sir.

Direct examination closed.

Cross-Examination by Mr. Cavanagh.

Cross-question 1. Did you ever sell tobacco?

Answer. No, sir.

X-Q. 2. Whose name is on that package?

A. Lorillard.

X-Q. 3. You have heard of Lorillard Company?

A. Well! I might and I might not. Lorillard? I might have heard of them. I can really not say. That I really don't know, because I don't use smoking tobacco. I know they don't make cigars. I have never seen them.

X-Q. 4. Did you ever see a Beech-Nut Packing Company's package with radiating red stripes (like Lorillard's Exhibit No. 16)?

A. No. I don't think I did.

X-Q. 5. You spoke of the Beech-Nut Packing Company's bringing out new lines of goods from time to time.

A. Yes.

X-Q. 6. This lines all relate to the grocery business or candy business?

A. Grocery and candy business mainly. Yes.

X-Q. 7. And if a man wanted some Beech-Nut groceries or Beech-Nut candy you wouldn't sell him Beech-Nut tobacco?

A. Not unless he asked for it.

X-Q. 8. Wouldn't confuse it with Beech-Nut tobacco?

A. No.

X-Q. 9. And if you want to see who puts out a package of goods you look for the name on it?

A. Not necessarily. Not necessarily. If I look at whole of package of goods, the first impression is what counts. If I see package of Fould's Macaroni, the yellow package draws my attention. That is Fould's Macaroni if I don't see name on it. If I see Heinz's Beans, a light blue can, I know that is Heinz' beans.

X-Q. 10. The word Beech-Nut on here attracts you?

A. Yes. Absolutely on that. "Beech-Nut" and the oval brand, and this little ding-a-lings. (Witness points to red Beech Nut in center of label.)

X-Q. 11. And you said that the Beech-Nut wrappers were different colors. What colors have they had?

A. The baked beans have now a brown label, brown colored. The trade-mark—I couldn't say exactly what color that is. It is oval on them. The macaroni, that's too new. I don't remember now what the color is on that. I know it has got oval trade-mark label with Beech-Nut mark on it. I know that. That's what I show when I have goods displayed. I am very careful that I have the package shown so that they can see the name of Beech Nut with oval label because that stands for quality.

X-Q. 12. What other colors do they use?

A. Jams, jellies, catsup? That I really cannot now recollect. Really I cannot say what colors.

X-Q. 13. In the grocery business tobacco is regarded as different from food products?

A. In grocery store of my kind. I have lot of people coming in, from smaller towns for package of tobacco. People do that naturally. Whenever anybody does come in. * * * *

X-Q. 14. Tobacco is different thing from food?

A. Naturally. Naturally.

Redirect Examination by Mr. Hinton.

Redirect Question 1. I understand you to say that in smaller towns people expect to find tobacco for sale in store which also sells groceries?

A. Absolutely. Absolutely. If I take an automobile trip and I go to a small place in the country, in general store, little country store, I go in there. One out there to Dunning and those places. Small stores. You find groceries, you find candies, you find ham, tobacco, cigarettes, cigars, and you even find stockings and those things.

Recross Examination by Mr. Cavanagh.

Recross Question 1. If you went into one of those country stores and asked for package of Beech Nut tobacco, but he handed you Beech-Nut Peanut Butter, you would think him crazy, wouldn't you?

A. I suppose so. Absolutely.

LUDWIG NURNBERG.

Stipulation.

It is stipulated by and between the parties hereto through their respective counsel that if Harry F. Stickney, 1154 54th Place, Chicago, Illinois, were called on, he would testify as follows:

My name is Harry F. Stickney, of lawful age. I am owner and manager of University Market, located at 1357 E. 57th Street, Chicago, Illinois.

I have for many years carried the Beech-Nut Packing Company's products and am familiar with its labels. The Beech-Nut label has stood for quality. It has been my experience that whenever the Beech-Nut Packing Company has come out with a new product different from previous products, bearing the same label, the public has very favorably received the new product. We do not handle chewing gum in our store. Chewing gum is generally carried by drug stores, candy stores, cigar and tobacco stores. When I saw Beech-Nut Scrap Tobacco, a duplicate of the package, Opposer's Exhibit No. 16, I immediately accepted this as a product of the Beech-Nut Packing Company by reason of the fact that the oval label on the package was the same as that which has appeared on the Beech Nut products I have for many years handled. I could not myself give a list of Beech-Nut Packing Company products. The only way I could tell whether a product was a Beech-Nut product would be to examine it and if I saw the Beech-Nut label on it, I would take it to be a Beech-Nut Packing Company product.

I do not sell tobacco, and therefore do not handle packages of tobacco like that shown by Exhibit 16. Furthermore if a purchaser came into the store, and asked me for a food product of the Beech-Nut Packing Company, such as preserves, Beech-Nut Peanut Butter,

chewing gum, or the like, I would not be confused into selling him a package of Beach Nut tobacco, like Exhibit No. 16, for a food product.

It is stipulated further by and between the parties hereto through their respective counsel, that if Louis Worthen of Chicago, Illinois, were called, he would testify as follows:

My name is Louis Worthen. I am of legal age and owner and manager of a grocery and confectionery on Sheridan Road, Chicago, near Irving Park Boulevard. This region is a region of apartment houses with a more or less mixed class of population.

I have for many years handled Beech-Nut products. The Beech-Nut oval labels stands for quality. It has been my experience that whenever this label appears on a new product the public will favorably accept that new product. I could not tell from memory what products the Beech-Nut Packing Company is making. In order to tell whether a product was a product of the Beech-Nut Packing Company, I would look for the Beech-Nut oval label.

I have seen during the past few years, the Beech Nut Scrap Tobacco, such as shown in Opposer's Exhibit No. 16. I always believed that this was a product of the Beech-Nut Packing Company by reason of the similarity of the label on this package to the Beech-Nut label. I do not handle tobacco products. I continued to believe that the Beech-Nut Scrap Tobacco referred to was the product of the Beech-Nut Packing Company until I was advised by Mr. Lewis, a salesman of the Beech-Nut Packing Company, that this product was not made by the Beech-Nut Packing Company. Mr. Lewis, left, perhaps by accident, a package of scrap tobacco in my store. This was laid on the shelf in the back part of the store.

Shortly after the package was placed there, a man came in to repair the telephone, observing the package, he said to me, "I didn't know that the Beech-Nut Company was putting out tobacco."

It is my opinion and belief that the public, familiar with the Beech-Nut Packing Company's label, through the very heavy advertising of the Beech-Nut Packing Company, would believe as I did that the Beech Nut Scrap Tobacco was part of the Beech-Nut Packing Company's line.

As above stated, I do not handle tobacco, and therefore do not sell this package like Exhibit No. 16.

I cannot recall the name of the man who stated that he did not know that Beech Nut Packing Company was putting out tobacco. Furthermore, if a customer came into my store and asked me for a package of Beech Nut Tobacco, I would not be confused into selling him chewing gum or a food product of the Beech-Nut Packing Company, such as preserves or Peanut Butter for a package of Beech-Nut Tobacco. Neither would I sell him preserves if he asked for macaroni, nor would I sell him any one food product in place of any other.

By Mr. Cavanagh: Attorney for P. Lorillard objects to such parts of the depositions of the witnesses Mrs. Matilda Wedel, Roy S. Yunker, Joseph Fleming, Walter Peabody, and Ludwig Nurnberg as relate or appertain to matters of alleged unfair competition, as being immaterial and irrelevant, in that such matters are not pertinent to or proper in connection with this opposition, and it is stipulated and agreed between counsel that this objection may stand as if made in detail in connection with the objected parts of the testimony of each of said witnesses.

Session closed.

Notary's Certificate.

STATE OF ILLINOIS }
County of Cook }^{ss.}

I, Sarah E. Harvey, a notary public within and for the county of Cook, and State of Illinois, do hereby certify that the foregoing depositions of Mrs. Mathilda Wedel, Joseph Fleming, Roy S. Yunker, Walter Peabody and Ludwig Nurnberg were taken on behalf of Beech-Nut Packing Company in pursuance of the notice hereto annexed, before me, at 1737-38 S. Dearborn Street and 1143 E. 55th Street, in the city of Chicago, in said county, on the 16th and 17th days of December, 1920; that said witnesses were by me duly sworn before the commencement of their testimony; that the testimony of each witness was taken by me stenographically and by me transcribed; that Richard Cavanagh, Esq., counsel for P. Lorillard Company, the opposing party, was present during the taking of said testimony; that the deposition was read by each witness before the witness signed the same; that I am not connected by blood or marriage with either of said parties, nor interested directly or indirectly in the matter in controversy.

In testimony whereof, I have hereunto set my hand and affixed my seal of office at Chicago, in said county, this 3rd day of January, 1921.

SARAH E. HARVEY,

[SEAL.]

Notary Public.

Notice of Opposition

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IN THE UNITED STATES PATENT OFFICE.

P. LORILLARD COMPANY

v.

BEECH-NUT PACKING COMPANY.

Trade-Mark Opposition No. 2805.

Beech Nut.

NOTICE OF OPPOSITION.

Honorable Commissioner of Patents:

Sir: In the matter of the application of the Beech-Nut Packing Company of Canajoharie, New York for the registration of the trade-mark Beech Nut filed June 25, 1919, Serial No. 119,930, for Cigarettes, in the Class of Tobacco Products; and published in the Official Gazette of September 9, 1919, at page 282, Vol. 266; P. Lorillard Company, a corporation, organized and existing under the laws of the State of New Jersey, and having its office and principal place of business at Number 119 West 40th Street, City, County and State of New York, believes that it would be damaged by such registration and hereby gives notice of its intention to oppose, and does hereby oppose, the registration of said trade-mark.

The grounds for opposition are as follows:

First.—That opposer is a corporation duly organized and existing under the laws of the State of New Jersey and having an office and principal place of business at No. 119 West 40th Street, New York City, N. Y., and is and has been for many years past engaged in manufacturing and marketing in large quantities throughout the United States, Tobacco Products in

various forms, such as cigars, little cigars, cigarettes and chewing and smoking tobacco of all kinds.

Second.—That for many years past, to wit, since about 1899, or prior thereto, the word symbol Beech Nut, has been continuously used by the opposer, P. Lorillard Company, or its predecessors in business and title as a trade-mark for Tobacco Products and particularly scrap tobaccos which are adapted to and utilized for both chewing and smoking purposes.

Third.—That the opposer, P. Lorillard Company, is now the owner of all the right, title and interest in and to the said trade-mark Beech Nut for Tobacco Products.

Fourth.—That at all times since the adoption of this trade-mark Beech Nut, about 1899, or prior thereto, it has been continuously used by the opposer or its predecessors in business, from whom it derived title, in connection with and as a trade-mark for Tobacco Products and particularly scrap tobaccos which are adapted to and utilized for both chewing and smoking purposes.

Fifth.—That since its adoption in 1899, or prior thereto as aforesaid, the said trade-mark has been uniformly known and recognized as indicating the true origin of the goods and as being the true property of the opposer or its predecessors.

Sixth.—That the Tobacco Products of opposer, the P. Lorillard Company and its predecessors in business, marketed under the said trade-mark Beech Nut have had for many years and now have an enviable reputation as of superior quality.

Seventh.—That the trade-mark Beech Nut sought to be registered by the Applicant, the Beech-Nut Packing Company, as aforesaid, conflicts with and is an in-

fringement upon the aforesaid trade-mark Beech Nut of this opposer.

Eighth.—That the goods for which Applicant seeks to register the trade-mark Beech Nut are of the same descriptive property and belong to the same class as those upon which the trade-mark of the opposer has been and is now being used.

Ninth.—That the trade-mark Beech Nut of the opposer has been in actual and continuous use as a trade-mark by the opposer and its predecessors since a date prior to the use of the word symbol Beech Nut as a trade-mark by the Applicant, Beech-Nut Packing Company, for any Tobacco Product, and, as opposer believes, prior to any use of the word symbol Beech Nut as a trade-mark by the Applicant, Beech-Nut Packing Company.

Tenth.—That the word symbol Beech Nut sought to be registered by the Beech-Nut Packing Company as a trade-mark is so similar in form, appearance, sound and other characteristics to the trade-mark Beech Nut of the opposer, as to be identical therewith, to be liable to cause confusion, and to cause confusion to the purchasing public, to be liable to cause damage, and to cause damage to this opposer, P. Lorillard Company, as the lawful owner of the trade-mark Beech Nut as aforesaid.

Eleventh.—That the manner in which the Applicant, Beech-Nut Packing Company, uses its alleged trade-mark upon and in connection with Tobacco Products, is such as to obviously cause confusion and deception to the purchasing public by leading the purchasing public into the belief that it is buying or accepting, and into buying or accepting the goods of the Applicant so marked for and in place instead of the goods of P.

Notice of Opposition

Lorillard Company, this opposer, the owner of the trade-mark aforesaid.

Wherefore, this opposer prays that the said alleged trade-mark of the Applicant herein opposed, be refused registration, as equity and good conscience demands.

Dated New York, N. Y.

P. LORILLARD COMPANY,
Opposer.

By THOMAS P. MALONEY,
President.
(Corporate Seal.)

MEYERS, CUSHMAN & REA,
Attorneys for P. Lorillard Company.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

On this 30th day of September, 1919, before me personally appeared Thomas J. Maloney, who being duly sworn, deposes and says that he is President of P. Lorillard Company, the opposer herein, and the person who signed this notice on behalf of said opposer; that he has read the foregoing notice of opposition as subscribed to by him and knows the contents thereof, and that the same is true of his own knowledge, except as to matters therein stated on information and belief, and as to those matters he believes them to be true, and that as an officer of the P. Lorillard Company he has full authority to sign this opposition in its behalf.

S. E. SPENCE,
Notary Public

(Seal.)

New York Co. No. 275;

New York Register No. 1115.

Stipulation

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IN THE UNITED STATES PATENT OFFICE.

P. Lorillard Company

v.

Beech-Nut Packing Company.

Trade-Mark Opposition No. 2805.

"Beech Nut."

STIPULATION.

Honorable Commissioner of Patents:

Sir: The parties hereto, through their respective counsel, having stipulated the testimony or depositions of David Haines Ball, S. E. Spence, Benjamin I. Belt, Alfred W. Haywood, Jacob Levy, Monroe W. Rothchild, Jesse R. Taylor, J. Lewis Orrick, all on behalf of P. Lorillard Company, said parties having further stipulated that the exhibits introduced by both parties might remain in the custody of such parties until final hearing, subject to call for inspection by the parties;

Therefore, it is stipulated and agreed by and before the parties hereto, through their respective counsel, that the delay in the filing of said stipulated depositions was inadvertent, and with the full knowledge of both parties, and the said stipulated depositions of P. Lorillard Company may now be filed without objection.

MEYERS, CAVANAGH & HYDE,
Attorneys for P. Lorillard Company.
OFFIELD, POOLE & HINTON,
Attorneys for Beech-Nut Packing Co.

New York, N. Y.,
August 27th, 1920.

Notice of Taking Testimony

IN THE UNITED STATES PATENT OFFICE.

In re Opposition No. 2805.

P. Lorillard Company

v.

Beech-Nut Packing Company.

NOTICE OF TAKING TESTIMONY.

James R. Offield, Esq.,

Attorney for Beech-Nut Packing Company,

38 South Dearborn Street,

Chicago, Ill.

Dear Sir: You will please take notice that beginning Wednesday, May 10th, 1920, at 11 o'clock in the morning, at the office of P. Lorillard Company, 18th floor, No. 119 West 40th Street, New York City, and before H. S. Ivie, a Notary Public in and for the County of New York, or other duly qualified officer, we will proceed to take testimony on behalf of P. Lorillard Company, one of the parties to the above-entitled opposition.

The witnesses to be examined are:

G. T. Minnegerode, 119 West 40th St., N. Y. City;

D. H. Ball, 119 West 40th St., N. Y. City;

George Lucius, 119 West 40th St., N. Y. City;

Richard J. Boylan, Flushing, L. I., N. Y.;

S. E. Spence, 119 West 40th St., N. Y. City;

Jacob Levy, 22 4th Ave., N. Y. City;

Munroe W. Rothschild, Park Row, N. Y. City;

J. R. Taylor, 44 West 18th St., N. Y. City;

Affidavit of Richard B. Cavanagh 101

Alfred W. Haywood, 536 West 113th St., N. Y.
City,

and others of whom due and timely notice will be
given.

The examination will be adjourned from day to
day. You are respectfully invited to attend and cross-
examine.

Yours very truly,

MEYERS, CUSHMAN & REA,
Attorneys for P. Lorillard Co.

Dated New York, N. Y.,
May 14th, 1920.

Service of the above notice acknowledged this....
day of May, 1920.

.....,
Attorneys for Beech-Nut Packing Co.

IN THE UNITED STATES PATENT OFFICE.

P. Lorillard Company

v.

Beech-Nut Packing Company.

Trade-Mark Opposition No. 2805.

"Beech Nut."

AFFIDAVIT.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

Personally appeared before me, a Notary Public
in and for the County of New York, Richard B. Cava-

Affidavit of Richard B. Cavanagh

nagh, who being duly sworn, deposes and says that, acting for the firm of Meyers, Cushman & Rea, attorneys of record for P. Lorillard Company in the interference of P. Lorillard Company v. Beech-Nut Packing Company, No. 2805, that he served a true copy of the attached notice of taking testimony upon James R. Offield, the attorney for the said Beech-Nut Packing Company, by mailing to the said Offield a true copy of said annexed notice of taking testimony, the said copy being mailed to the said Offield on or about the 14th day of May, 1920, and addressed to said Offield at his office, No. 38 South Dearborn Street, Chicago, Illinois.

Deponent further says that in response to said notice the said Offield attended the taking of testimony as attorney for the Beech-Nut Packing Company.

RICHARD B. CAVANAGH.

Sworn to and subscribed before me this 7th day of September, 1920.

AGATHA F. BRESLIN,

(Seal.)

Notary Public, Bronx County.

County Clerk's No. 88; Certificate filed in N. Y. County; Clerk's No. 633; Term expires March 30, 1921.

IN THE UNITED STATES PATENT OFFICE.

P. Lorillard Company

v.

Beech-Nut Packing Company.

Trade-Mark Opposition No. 2805.
Beech Nut.

DEPOSITIONS OF WITNESSES.

PRIMA FACIE PROOFS OF P. LORILLARD COMPANY.

Depositions taken on behalf of P. Lorillard Company, pursuant to notice, before H. S. Ivie, a Notary Public, at the office of P. Lorillard Company, No. 119 West 40th St., New York City, beginning this 19th day of May, 1920, at 2 P. M.

Present: R. B. CAVANAGH, for Meyers, Cavanagh & Hyde, attorneys for P. Lorillard Company;

JAMES R. OFFIELD, attorney for Beech-Nut Packing Company.

It is hereby stipulated by and between the parties to the above-entitled interference as follows:

1. By virtue of an assignment, an instrument in writing duly acknowledged and dated the 29th day of October, 1903, the Harry Weissinger Tobacco Company sold, assigned and transferred to the Continental Tobacco Company all its property and business, including amongst other matters and things, its business of manufacturing and selling tobacco in its vari-

ous forms, together with certain trade-marks and brand pertaining thereto, including the trade-mark Beech Nut, and the authenticity of said assignment is admitted.

2. That by virtue of an assignment, an instrument in writing duly acknowledged and dated the 17th day of December, 1903, the Continental Tobacco Company sold, assigned and transferred to Luhrman & Wilbern Tobacco Company, amongst other matters and things, all the right, title and interest of the said Continental Tobacco Company in the business of manufacturing and selling chewing and smoking tobacco bearing the trade-name or trade-mark Beech Nut together with the good will and reputation attaching or connected with said trade-name or trade-mark for smoking and chewing tobacco and the authenticity of said document is admitted.

3. By an assignment, an instrument in writing dated the 1st day of September, 1913, Luhrman & Wilbern Tobacco Company sold and assigned to P. Lorillard Company, the Opposer herein, all its assets and business as a going concern wheresoever situated, including all brands and trade-marks owned by it with the business thereon, and the good will thereof, and the authenticity of said assignment is admitted.

4. That Harry Weissinger Tob. Co. registered the trade-mark or brand Beech Nut for smoking tobacco with Connorton's Bureau of Registration for Tobacco Brands, as set forth on page 378 of Connorton's Tobacco Brand Directory of the United States for the year 1898, as follows: "Beech Nut granulated, Harry Weissinger Tob. Co., Louisville, Ky." That in Connorton's Tobacco Brand Directory of the United States for the year 1899 the trade-mark Beech Nut of the

Harry Weissinger Tob. Co., of Louisville, Ky., is listed as follows on page 172, under the heading "Smoking Tobaccos": "Beech Nut, Harry Weissinger Tob. Co., Louisville, Ky." That in Connorton's Tobacco Brand Directory of the United States for the year 1903, on page 328, under the heading "Smoking Tobaccos," the brand Beech Nut is listed as follows: "Beech Nut (scrap) Harry Weissinger Tob. Co., Louisville, Ky."

5. Concerning certain witnesses noticed to be called by P. Lorillard Company in the presentation of its prima facie case, it is hereby stipulated and agreed by and between the parties hereto, that if the following witnesses were called on behalf of the Lorillard Company and sworn under oath, each of said witnesses would testify as follows:

DAVID HAINES BALL.

My name is David Haines Ball; I am fifty years of age; address No. 119 West 40th Street, New York City; residence No. 327 E. Sidney Ave., Mt. Vernon, N. Y., and I am Vice-President of the P. Lorillard Company, which concern is engaged in the tobacco business. I have charge of the selling of smoking and chewing tobacco products of P. Lorillard Company.

I have been engaged in the tobacco business for the past thirty years and since 1911 I have been Vice-President of P. Lorillard Company. Prior to that time I was associated with The American Tobacco Company as a departmental head with particular reference to smoking tobacco.

The original Lorillard tobacco business was established by Pierre Lorillard in 1760, and the present company is a successor of this original house and is, therefore, to the best of my knowledge and belief the

oldest tobacco concern in the world. It is also one of the largest and at the present time is doing business of approximately eighty million dollars per year. Its business extends all over the United States and in foreign countries. This concern has twenty-five branches in twelve cities, with very large factories in New York City, N. Y., Richmond, Va., Baltimore, Md., Middletown, Ohio and New Jersey. P. Lorillard Company employs approximately 12,000 people. It manufactures and sells tobacco products of every character and description, except snuff. It owns, manufactures and markets some of the most prominent tobacco brands known to the public and to the trade. For example, it puts out such well known smoking tobacco as "Union Leader," "Sensation," "Mechanics' Delight," "Omega," "Just Suits," "Stag," and others. In cigarettes it owns the S. Anargyros Co., who manufacture and market such well known brands as "Egyptian Dieties," "Murad," "Mogul," "Helmar," "Turkish Trophies" and others. In chewing tobacco it owns, manufactures and markets "Climax," "Planet," "Neptune," "Mechanics' Delight," "Beech Nut," and "Red Cross." Amongst the fine cut tobaccos of this country are "Tiger," "Pioneer," "Old Fashioned," and "Eureka." As scrap tobaccos it owns, manufactures and markets "Honest," "Polar Bear," "Beech Nut," "Bag Pipe," "Old Nut" and others.

Referring particularly to the trade mark Beech Nut, the Lorillard Company has marketed and is marketing both chewing and smoking tobacco under this name and has made all its preparations for making and selling a cigarette under this name, though the cigarette has not yet been put upon the market.

So far as the history of Beech Nut as a trade mark for tobacco products is concerned my personal knowledge dates more particularly from the year 1915, when the Lorillard Company began actively pushing this brand on the market; but I do know that for many years prior to 1915 the Luhrman & Wilbern Tobacco Co., a predecessor of P. Lorillard Company, had been making and marketing tobacco for chewing and smoking under this trade mark.

I have been furnished a statement from the books of this company and that of Luhrman & Wilbern Tobacco Company showing the sales of the tobacco products under the brand Beech Nut, by years from 1904 to 1919 inclusive, by these companies hereto annexed as P. Lorillard Co., Exhibit 1.

In February, 1915, the Lorillard Company began to actively push this Beech Nut brand of tobacco under the trade mark "Beech Nut" and put it up in the form of both plug and smoking and chewing tobacco known as scrap and I submit herewith and make a part hereof as P. Lorillard Co. Exhibit 2 a sample package of the P. Lorillard Beech Nut scrap tobacco in the form in which it has been put upon the market since 1915. It will be noted from the schedule which I have submitted as Exhibit 1 that from 1915 down to the present year the sales of this Beech Nut scrap tobacco have increased by leaps and bounds, until in the year 1919 the total sales of this Beech Nut tobacco by P. Lorillard Company amounted to nearly twenty-six and one-half million pounds, with a money value of approximately fourteen millions of dollars. Its importance can be appreciated when it is realized that by these figures the Lorillard Company's business in Beech Nut tobacco for the year 1919 was approximately one-sixth of its entire business.

Beech Nut tobacco in packages, like Exhibit 2, has been sold in practically every State in the United States, and to the majority of the largest tobacco houses and dealers. In New York, it has been sold in great quantities to such well known tobacco jobbers and tobacco concerns as The Metropolitan Tobacco Company, the United Cigar Stores and Schulte Cigar Stores. It is well known that the Metropolitan Tobacco Company is the largest jobber and distributor of tobacco products in the United States and that there are hundreds of United Cigar Stores and Schulte Cigar Stores in the large cities throughout the United States.

I also submit herewith as P. Lorillard Co., Exhibit 3, a carton or pasteboard box in which the smaller or retail packages of Beech Nut scrap tobacco are packed and it will be noted that this carton has the word "Beech Nut" prominently displayed thereon, together with the word "Lorillard's."

Beech Nut in my opinion is recognized as the trade mark of the Lorillard Company when applied to tobacco products. The Lorillard Beech Nut tobacco has been extensively advertised since 1915 in various ways, has been displayed by advertisements, placards, window displays and window posters, and by the distribution of samples. I submit herewith as P. Lorillard Co. Exhibit 4 certain posters which are used in advertising the Lorillard Beech Nut scrap tobacco, packed as shown by Exhibit 2.

In the tobacco industry, cigarettes are recognized as belonging to the same general class of goods as smoking, chewing and plug tobacco of various forms, that is to say, cigarettes are a tobacco product just as smoking, chewing and plug tobacco are tobacco products, and the goods are of course sold by the same

class of jobbers and dealers, for example, through retail tobacco stores.

Therefore, in my opinion should any other person, or concern than the P. Lorillard Company place upon the market a cigarette or other tobacco product under the name Beech Nut, it would cause confusion in the tobacco trade, lead both the dealers and the purchasing public to believe that they were obtaining a Lorillard product when in fact they would be obtaining the late-comer's product, who would be selling his brand of tobacco upon a reputation established by the Lorillard Company for its Beech Nut brand, and consequently would naturally cause a loss of sales to the Lorillard Company and would interfere with its business thus causing it damage and injury.

In this connection another serious factor would be that the Lorillard Company, which has been established over 150 years, has a world wide reputation for the excellence of superior standard. The tobacco business requires men of peculiar skill and knowledge of the business and were Beech Nut tobacco to be put out by a concern not familiar and experienced in the manufacture and sale of tobacco products it could not but hurt the reputation and standard of the Beech Nut tobacco products put out by the Lorillard Company.

S. E. SPENCE.

My name is S. E. Spence; I am forty-nine years of age; address, No. 119 West 40th Street, New York City, and am District Manager for P. Lorillard Company; a corporation engaged in the manufacture and marketing of all kinds of tobacco products, except snuff. I have been in the tobacco business about seventeen years and have been with the P. Lorillard Company since December, 1911. From August, 1903, to Decem-

ber, 1903, I was associated with the Continental Tobacco Company, and from January, 1904, to December, 1911, I was Secretary and Auditor for Lührman & Wilbern Tobacco Co. While I was with the Continental Tobacco Company in 1903 I know that it took over the property, business, trade marks, good will and the like of the the Harry Weissinger Tobacco Company of Louisville, Ky., including the trade mark Beech Nut which Weissinger used on tobacco, and that subsequently the Continental Tobacco Company transferred this brand Beech Nut together with the business and good will thereof to Lührman & Wilbern Tobacco Company, and that subsequently Lührman & Wilbern was taken over by the Lorillard Company together with all its business, trade marks and the like, and I was a witness to the written document of sale and assignment of the Lührman & Wilbern Tobacco Co. to the P. Lorillard Company. I also know of my own knowledge that from 1904 to the time Lührman & Wilbern was taken over by P. Lorillard Company it manufactured and marketed such brands of tobacco as "Polar Bear," "Old Nut," "Scrap Iron," "Bag Pipe" and "Beech Nut," except the years noted.

As to the Beech Nut tobacco I produce herewith and mark it P. Lorillard Co. Exhibit 5 one of the paper bags or packages in which Lührman & Wilbern packaged and sold Beech Nut tobacco from 1904 to 1911. During the early years that Lührman & Wilbern were putting out this Beech Nut tobacco, after taking over the business of Harry Weissinger Tob. Co., it sold what was quite a quantity for those days, although the same might appear small today. The brand was sold in those days particularly through such States as Ohio, Pennsylvania and West Virginia. It was sold in Pitts-

burgh to such concerns as Jenkins, Ewart, Arbuckles and others, and in Cumberland, Md., to J. C. Orrick & Sons Co. I refer to the table of sales forming part of the stipulated deposition of Mr. Ball, Vice-President of the Lorillard Company, Exhibit 1, and make particular reference to that portion of the table covering the years 1904-1911 when I was Secretary and Auditor of Luhrman & Wilbern Tobacco Company. This table was made from the books forming the records of the Luhrman & Wilbern Tob. Co., and it will be noted that the sales gradually diminished until 1910 but twenty-five pounds were made and sold. Luhrman & Wilbern did not make and sell any Beech Nut Tobacco during the years 1911-1914, as shown by said table, for the brand was not pushed during those years, as other brands were being actively marketed, and in the tobacco business, as in any other business it is necessary to actively push a brand and keep it before the public in order to keep up the sales. However, the brand and trade mark was not dropped or abandoned, for Luhrman & Wilbern during those years had on hand the necessary materials such as the formula, tobacco, wrappers and packages necessary to fill any order received from a customer for Beech Nut tobacco, and I, as Auditor and Credit man for this concern, would have O. K.'d any genuine order received from a responsible concern for this tobacco during those years. In February, 1915, the Lorillard Company as owners of the trade mark and brand again began to actively push this Beech Nut tobacco and it has had large sales ever since, until today it is one of the most prominent brands of tobacco owned and marketed by the P. Lorillard Company. During the time I was with the Luhrman & Wilbern Tobacco Co., this Beech Nut trade mark

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for tobacco was recognized as the property of Luhrman & Wilbern Tobacco Co., as successors of the Harry Weissinger Tobacco Co., as it is today recognized as the trade mark of the P. Lorillard Company for tobacco products as the successor of the Luhrman & Wilbern Tobacco Company. The Continental Tobacco Co. held the mark and business for a short time before it transferred it to Luhrman & Wilbern Tobacco Co.

As one long engaged in the tobacco business, and familiar therewith, it is my opinion that should any other person or concern enter the market with a tobacco product, such as a cigarette, under the name or trade mark "Beech Nut," such action would be injurious and damaging to the P. Lorillard Company, for the reason that this concern in the tobacco industry is recognized as the owner and manufacturer and seller of Beech Nut tobacco. This company has an enviable reputation for the excellence of its tobacco product, and is one of the largest tobacco manufacturers in the United States, if not in the world, and also one of the oldest. Purchasers would in my opinion confuse the late-comer's tobacco with the P. Lorillard Company's Beech Nut tobacco, resulting in lost sales and consequent injury and damage to the business of P. Lorillard Company. The manufacturer of tobacco, particularly the blending thereof, requires a high degree of skill and experience, and the injury to P. Lorillard Company would be aggravated did the late-comer place upon the market a tobacco under the name or trade mark "Beech Nut," not up to the Lorillard's standard or not suitable to the public taste, as this would have a very bad effect upon the reputation of the Beech Nut tobacco now sold by P. Lorillard Company, and of great popularity as shown by the millions of pounds sold annually.

BENJAMIN I. BELT.

My name is Benjamin I. Belt and I am of lawful age. I reside at the Hotel Marie Antoinette in New York City, and am now a Vice-President of P. Lorillard Company, as I have been ever since the organization of the present Lorillard Company.

The Lorillard Company is one of the four largest makers and distributors of tobacco products in the United States, having outstanding securities as follows:

Preferred Stock.....	\$11,307,600.00
Common Stock	30,311,200.00
5% Bonds	10,617,450.00
7% Bonds	10,208,300.00

For the year 1919 the aggregate retail money value of its output was something over \$80,000,000.00. It has twenty-five branches located in twelve different cities of the United States. It makes and sells all manner of tobacco products with the single exception of snuff.

I am in direct charge of the selling of cigarettes for the Company and my knowledge of its products has more particular reference to cigarettes, but I do know that the Company has been for a good many years actively making and selling a tobacco under the trade mark "Beech Nut," which is adapted and used for both chewing and smoking, and that the term "Beech Nut" as applied to tobacco products has come to be known in the tobacco trade as indicating a product of the Lorillard Company.

Prior to coming with the P. Lorillard Company in December, 1911, I was connected with The American Tobacco Company as head of its cigarette selling department, and I have been in the tobacco business,

principally connected with the selling of cigarettes, for the past 20 years.

In or about the summer of 1916, this Company conceived the idea of making and marketing a blended cigarette, for which purpose it selected the trade mark "Beech Nut," as being a trade mark already owned by this Company for tobacco products and known throughout the tobacco world as indicating Lorillard tobacco products. For this purpose printers and lithographers were approached in order to obtain labels, wrapping material and advertising matter, with the result that after the trying-out of many different color schemes, there was adopted the package for this brand of cigarette, a sample of which is herewith filed and marked P. Lorillard Co. Exhibit No. 6. Raw material was acquired and a blend selected for the cigarette, and all preparations were made, and the Company had prior to May, 1919, put itself in a position of entire readiness to make this brand and place it on the market, but though many of the cigarettes were made up and packed into these packages, and the internal revenue stamps affixed and cancelled, no cigarettes under the brand "Beech Nut" had yet been sold, the reason being that the Company considered the time, for various reasons, unfavorable to an attempt to make and market this brand. The Company has in no wise abandoned its idea of making and marketing the cigarette under this trade mark. It is simply postponing so doing until what it considers a favorable time for the purpose.

I herewith file as an Exhibit, P. Lorillard Co. Exhibit No. 7, a letter to this Company from Wolcott Brothers Company, dated August 25th, 1916, and as P. Lorillard Co. Exhibit No. 8, an order O. K.'d by me under date of September 15, 1916, for one million

"Beech Nut" cigarette shells for the purpose of making and marketing this brand.

My experience in the tobacco business and my knowledge of the extent to which this Company has made and sold tobacco products under the trade mark "Beech Nut," makes me feel certain that the attempt by any other concern to make and market a tobacco product under the trade mark "Beech Nut" would operate most injuriously to the interests of this Company, as it would be a seller by the last comer on the reputation established for "Beech Nut" as a tobacco trade mark by the Lorillard Company, and if the product of the last comer were inferior, that inferiority would be charged by the trade against the products made and sold by the Lorillard Company under the trade mark "Beech Nut."

Furthermore, it would cause confusion in the trade and induce the public to buy the product of the last comer in the belief that they were thereby getting the product of the Lorillard Company with its usual standard of manufacturing excellence and quality. This would undoubtedly result, in my opinion, in the loss of sales by P. Lorillard Company, and consequently would result in damage, and inevitably loss and injury, to the business, reputation and finance of this Company.

ALFRED W. HAYWOOD.

My name is Alfred W. Haywood, of lawful age, residing at 536 West 113th St., New York City, and am an attorney at law by profession. During the year 1915 and for several years thereafter I was Assistant Counsel for P. Lorillard Company, tobacco manufacturers and distributors, No. 119 West 40th Street, New York City. In due course of business, on May 27th,

1915, June 10th, 1915, and June 19th, 1915, I wrote certain letters to the Broecker Tobacco Company of New Albany, Indiana, on behalf of the P. Lorillard Company, requesting them to desist in the use of the name Beech Nut for twist tobacco as this trade mark for tobacco product was the property of the P. Lorillard Company. I received a reply acknowledging these communications, which reply in reference thereto stated, in substance that our notice was sufficient. July 14th, 1915, I replied to this communication on behalf of the P. Lorillard Company stating that I understood the Broecker Tobacco Company would refrain from using the name "Beech Nut" tobacco. This "Broecker" correspondence is submitted herewith as P. Lorillard Co. Exhibit No. 9.

On October 1st, 1915, on behalf of the P. Lorillard Company, I addressed a letter to C. E. Schutz, Esq., Evansville, Indiana, calling attention to an earlier letter of September 16, 1915, wherein Mr. Schutz was requested to discontinue using the name Beech Nut for twist tobacco. On October 9, 1915, a reply was received from Mr. Schutz agreeing to discontinue as per our request. This "Schutz" correspondence is submitted as Lorillard Exhibit No. 10.

My recollection is that I also notified one or two other parties who were attempting to use Beech Nut for tobacco products, and that these parties also agreed to discontinue.

JACOB LEVY.

My name is Jacob Levy, of lawful age, address No. 22 Fourth Ave., New York City, and am buyer for the Metropolitan Tobacco Co., which is generally regarded in the tobacco industry as the largest jobber of tobacco

products in the United States. In the year of 1915, and since that time the Metropolitan Tobacco Company has purchased hundreds of thousands of pounds of Beech Nut tobacco from the P. Lorillard Company which is recognized as one of the oldest and largest tobacco manufacturing concerns in the United States. The Metropolitan Tobacco Company has in turn sold the Lorillard Beech Nut tobacco to numerous customers in the State of New York, New Jersey, Connecticut and other States. The Metropolitan Tobacco Company in and since 1915 has continually purchased this tobacco from the P. Lorillard Company, and is so purchasing it today. It is a very popular brand, has a wide sale, is recognized in the tobacco industry as the brand of P. Lorillard Company, that is to say, "Beech Nut" as applied to tobacco products is recognized as P. Lorillard Company's trade mark. Cigarettes in the tobacco business are recognized, of course, in the same category as smoking and chewing tobacco, cigars, plug, etc., as all are tobacco products, and are sold by cigar stores, tobacco dealers and others dealing in tobacco products. In my opinion should any other person or concern place a Beech Nut cigarette or other form of tobacco product upon the market it would be injurious and damaging to the business of P. Lorillard Company, and confusing to the public and dealers in tobacco, because it would lead the public and dealers to believe that the late-comer's brand of tobacco was that of the P. Lorillard Company, because of the use of the same name Beech Nut, would result in lost sales to the P. Lorillard Company, and if the late-comer's brand was not up to the recognized excellence of P. Lorillard Company's product, this would also seriously affect the reputation and sale of the P. Lorillard Company's Beech Nut tobacco.

MONROE W. ROTHSCILD.

My name is Monroe W. Rothschild; I am of lawful age; address, World Building, New York City; have been in the tobacco business for fourteen years and am Sales Manager for the Schulte Company which has hundreds of Schulte Cigar Stores throughout the United States, these cigar stores being located in the principal large cities.

In 1915, and each year since then, up to the present time, the Schulte concern has purchased thousands of pounds of Beech Nut tobacco, under this name, from the P. Lorillard Company, and has sold this Beech Nut tobacco of P. Lorillard Company in the various Schulte stores throughout the country. It is a very popular brand of tobacco and has a wide sale through the Schulte stores. It is sold in the form shown by the Exhibit No. 2 of Mr. Ball's stipulated deposition, and it is also sold in plug form. In the tobacco industry, in which I have been engaged for the past fourteen years, Beech Nut, as applied to tobacco products, is recognized as the trade mark of P. Lorillard Company. In the trade cigarettes are recognized of course as a tobacco product and are sold by the same class of dealers as those dealing in other forms of tobacco, smoking and chewing, cigars and the like. In my opinion should another concern other than P. Lorillard Company place a tobacco product, such as a cigarette, on the market under the name Beech Nut, it would be damaging and injurious to the business of P. Lorillard Company by reason of causing confusion in the trade resulting in the sale of the late-comer's product as that of the P. Lorillard Company, thus resulting in lost sales to the latter concern. Beech Nut tobacco has been and is ordered by the Schulte Company from the Loril-

lard Company under the name Beech Nut, and has been and is sold in our stores as Beech Nut tobacco, the name appearing prominently on the packages.

JESSE R. TAYLOR.

My name is Jesse R. Taylor; I am of lawful age, address, No. 44 West 18th Street, New York City, and I am Vice-President of the United Cigar Stores Company of America. This company has hundreds of retail cigar stores throughout the United States, in practically all the principal cities of the United States. Beginning in 1915, and yearly and continuously thereafter it has purchased and sold hundreds of thousands of pounds of Beech Nut tobacco made by the P. Lorillard Company. It has purchased from the P. Lorillard Company and sold to customers hundreds of thousands of packages of Beech Nut tobacco like that exemplified by Exhibit No. 2 of Mr. Ball's stipulated deposition, and has also purchased and sold great quantities of the Beech Nut plug made by P. Lorillard Company. The P. Lorillard Company's Beech Nut tobacco is a very popular brand and has a tremendous sale, to my knowledge, through the United Cigar Stores. In the tobacco business cigarettes are recognized as a tobacco product, and are sold in our stores along with other forms of smoking and chewing tobacco, cigars and the like. The Beech Nut trade mark for tobacco products is recognized in the tobacco industry as the trade mark of the P. Lorillard Company, and should any other tobacco product be put upon the market by any other concern than the P. Lorillard Company under this name or trade mark Beech Nut, it would in my opinion be injurious and damaging to the P. Lorillard Company's business, particularly as

affecting the Beech Nut tobacco business of this concern, by reason of the fact that confusion would in my opinion occur in the trade and also to the public by reason of the identity of the names, and the late-comer's product would be confused with that of the P. Lorillard Company, thus affecting injuriously the sales of the latter's product. Furthermore the P. Lorillard Company's products, particularly Beech Nut tobacco, have a high reputation for excellence, and the appearance of another tobacco product than that of the P. Lorillard Company under this name Beech Nut would in some measure feed upon and reap the benefit of the reputation of the P. Lorillard Company's brand to the disadvantage financially and otherwise of the P. Lorillard Company.

IN THE UNITED STATES PATENT OFFICE.

P. Lorillard Company

v.

Beech-Nut Packing Company.

Trade-Mark Opposition No. 2805.

"Beech Nut."

CERTIFICATE OF OFFICE.

COUNTY OF NEW YORK, }
STATE OF NEW YORK, } ss.:

I, H. S. Ivie, a Notary Public within and for the County of New York and State of New York, do hereby certify that the foregoing stipulated depositions of David Haines Ball, S. E. Spence, Benjamin I. Belt, Alfred W. Haywood, Jacob Levy, Monroe W. Roths-

child and Jesse R. Taylor were taken on behalf of P. Lorillard Company in pursuance of notice hereto annexed, before me, at the office of P. Lorillard Company, No. 119 W. 40th Street, in the State of New York, in said County, on the 19th day of May, 1920; that said stipulated testimony of said witnesses were written out by Margaret H. Gebhardt in my presence; that the opposing party, Beech-Nut Packing Company, was present, being represented by James R. Offield, as counsel; that said counsel for the Beech-Nut Packing Company agreed with counsel for P. Lorillard Company to stipulate the said testimony of the said witnesses; that the counsel of both parties read over and approved and agreed to the stipulated testimony after it was written out; and that I am not connected by blood or marriage with either of said parties, nor interested directly or indirectly in the matter in controversy.

In testimony whereof I have hereunto set my hand and affixed my seal of office at New York City, in said County, this 22nd day of May, 1920.

(Seal.)

H. S. IVIE,
Notary Public.

New York Co. No. 25; New York Register No. 1122.

6. It is further stipulated by and between the parties hereto, that if J. Lewis Orrick, was called as a witness on behalf of P. Lorillard Company, he would testify as set forth in the below, duly executed, affidavit, notice of this witness and his production, for examination, being hereby waived.

STATE OF MARYLAND, }
COUNTY OF ALLEGANY, } ss.:

J. LEWIS ORRICK

being first duly sworn, deposes and says as follows:

I am of lawful age, a resident of Cumberland, Maryland, and am Secretary and Treasurer of the J. C. Orrick & Sons Co., of Cumberland, Maryland, wholesale grocers and jobbers. This concern has been continuously engaged in business for over half a century, being established in 1863, and incorporated in 1887. Its trade now, as in the past, extends throughout Maryland and the neighboring states. My father, Mr. C. J. Orrick, now deceased, was formerly President of the company, and I, myself, have been connected with this concern for many years past, and am, and have been, familiar with its business and its records.

I know that the J. C. Orrick & Sons Co., purchased, kept in stock and sold "Beechnut" tobacco for many years and it is at the present time, purchasing "Beechnut" tobacco and "Beechnut" plug tobacco from the P. Lorillard Company and is selling such "Beechnut" tobacco to its customers.

I have recently had occasion, at the request of certain representatives of P. Lorillard Company, to examine our old records, or rather the records of the J. C. Orrick & Sons Co., in my charge, for the purpose of endeavoring to ascertain when and from whom the J. C. Orrick & Sons Co. purchased "Beechnut" tobacco. As a result of this examination of the records of my company, and which records have been kept in due course of business, I produce herewith, certain paid invoices, showing that in 1902, in the months of February and November, the J. C. Orrick & Sons Co., pur-

chased "Beechnut" tobacco from Harry Weissinger Tob. Co.; that in February and March, 1903, this concern, the J. C. Orrick & Sons Co., purchased "Beechnut" tobacco, from the Continental Tobacco Co.; and that in December, 1906, and January, 1908, the J. C. Orrick & Sons Co. purchased "Beechnut" tobacco from Luhrman & Wilbern Tobacco Co.

For the sake of convenience, I now set forth in this affidavit, a tabulated statement of these invoices:

HARRY WEISINGER TOB. CO.

Invoice Date.	Manufacturers No.	Date Bill Paid by
		J. C. Orrick & Sons Co.
Feb. 2, 1902	1482	2-17-02
" 11, 1902	818	2-27-02
" 11, 1902	1495	2-21-02
Nov. 21, 1902	14851	11-21-02

CONTINENTAL TOBACCO CO.

Feb. 19, 1903	2638	2-29-03
Mar. 17, 1903	4656	3-29-03
Mar. 27, 1903	5481	4- 3-03

LUHRMAN & WILBERN TOB. CO.

(Goods shipped from Middletown, Ohio)

Dec. 13, 1906	(1—100 Polar Bear)	Dec. 1906
	(1—100 Beech Nut)	
Jan. 24, 1908	71958	Feb. 3, '08
	(1—100 Beech Nut)	

The four original Weisinger Invoices are herewith submitted and made a part of this affidavit, and are marked "P. Lorillard Co. Exhibit No. 11."

The three original Continental Tobacco Co. in-

voices, are herewith submitted and made a part of this affidavit, and are marked "P. Lorillard Co. Exhibit No. 12."

The Luhrman & Wilbern Tob. Co., original invoices, are herewith submitted, and made a part of this affidavit, and are marked "P. Lorillard Co. Exhibit No. 13."

I might also state that in my examination of our records, I find that one of our stock books shows the following:

January	1, 1907—"Beech Nut" in stock	
December	31, 1908	do
January	1, 1910	do
August	4, 1910	do
March	1, 1911	do

From any familiarity with the records of the J. C. Orrick & Sons Co., and the system then employed in keeping the same, I can state that these entries mean that at the time of "taking stock," at or about the dates appearing, we had on hand, "Beechnut" Tobacco.

I will further state that some months prior to the making of this affidavit, a representative of the P. Lorillard Company, called at the place of business of the J. C. Orrick & Sons Co., here in Cumberland, Maryland, and made inquiry as to our having purchased and sold "Beechnut" tobacco in years gone by. I told him I thought we had some very old "Beechnut" tobacco still in stock, and upon looking into the matter, I found this to be so, and I sold the gentleman a large carton containing small retail packages of "Beechnut" tobacco, which the label on the package shows, was the product of the Harry Weissinger Tob. Co. of Louis-

ville, Kentucky. I produce herewith as Exhibit No. 14, one of these small packages of tobacco, identical with those in the carton sold to the P. Lorillard Co. representative, and it will be noted that it bears a red label, with the word "Beechnut" thereon, the picture of a squirrel, the words "Chewing and Smoking Tobacco" and the name of the manufacturer or producer, "Harry Weissinger Tobacco Co."

To the best of my knowledge and belief, this Harry Weissinger Tobacco Co., "Beechnut" tobacco, which the J. C. Orrick & Sons Co., recently sold to the P. Lorillard Co. representative, had been in our stock for many years, prior to such sale, and we always stood ready and willing to sell the same to any responsible purchaser who might call for it.

I have been connected with the J. C. Orrick & Sons Co., in one capacity or another, for nearly twenty years, and I know to my own personal knowledge, that this concern, during the first years of my connection therewith, was selling "Beechnut" tobacco which, to the best of my knowledge and belief, was purchased from Harry Weissinger Tob. Co., Continental Tobacco Co. and Luhrman & Wilbern Tobacco Co.

J. LEWIS ORRICK,

Affiant.

Sworn to and subscribed before me this 1st day of June, 1920.

(Seal.) **LLOYD RAWLINGS,**
Notary Public, in and for
Allegany County, Maryland.

My commission expires 1st Monday in May, 1922.

Depositions

IN THE UNITED STATES PATENT OFFICE.

P. Lorillard Company

v.

Beech-Nut Packing Company.

Trade-mark Opposition.

DEPOSITIONS.

Taken at Pittsburgh, Pa., Wednesday, June 9th, 1920, before Clarence A. Williams, Notary Public.

Pittsburgh, Pa., June 9th, 1920.

Met, pursuant to agreement, before Clarence A. Williams, a Notary Public in and for the County of Allegheny, Commonwealth of Pennsylvania, formal notice of the production for examination of the witnesses, W. H. Nichol, William M. Gormly, H. H. Arnold, Charles C. St. Clair, T. F. Coyle and H. O. Evans, being waived.

Present: R. B. CAVANAGH, Esq., on behalf of P. Lorillard Company.

SEBASTIAN HINTON, Esq., on behalf of Beech-nut Packing Company.

The direct testimony of W. H. Nichol, a witness called on behalf of P. Lorillard Company, is hereby stipulated as follows, subject to cross-examination, the introduction in evidence of the record book referred to by the witness being waived.

W. H. NICHOL.

Being first duly sworn by the said Clarence A. Williams, acting as Examiner, by consent, deposes and says as follows:

I am of lawful age, a resident of Pittsburgh, Pennsylvania, and am connected with Allen Kirkpatrick & Company, wholesale grocers and jobbers, located at 903 Liberty Avenue, Pittsburgh, Pennsylvania.

I have been connected with this concern for about twenty-five years, and I know that during the years of 1901-1902 to 1903, Allen Kirkpatrick & Company purchased tobacco, under the name or mark, "Beechnut," and sold this tobacco to the trade. Since 1915, and to the present time, Allen Kirkpatrick & Company have continuously purchased, from P. Lorillard Company, large quantities of tobacco, under the name or mark, "Beechnut," and put up in packages similar to that shown by P. Lorillard Company Exhibit No. 16.

Recently, I was asked by Mr. A. C. Hursh, a representative of the P. Lorillard Company, to examine some of our old records, for the purpose of ascertaining when and from whom "Beechnut" tobacco was purchased. Upon examining our Cost Book records, I find that the first purchase Allen Kirkpatrick & Company made of "Beechnut" tobacco was on the 25th of July, 1901, from Harry Weissinger Tobacco Company, of Louisville, Kentucky. In 1901, Allen Kirkpatrick & Company made six separate purchases of this "Beechnut" tobacco from Harry Weissinger Tobacco Company; in 1902, six purchases; in 1903, one purchase, from Lührman & Wilbern Tobacco Company.

For the sake of convenience and clearness, I set forth here below a true copy of the entries appearing

upon these records of Allen Kirkpatrick & Company, relating to "Beechnut" tobacco, as follows:

PRICE BOOK

Cut & Dry—Sundry Brands Tobacco.

1901.

July 25—5 cases—20—2½ oz. Beechnut H. W. Tob. Co. 24—24
 Sept. 4—20 " 10—1 Beechnut H. Weissinger T. Co.
 24—24

Sept. 25—20 " 10—1 Beechnut H. Weissinger T. Co.
 20 C.—20

Oct. 4—25 " 10—1 Beechnut H. Weissinger 24—24

Tobacco—Harry Weissinger Tobacco Co.

Nov. 19—25 " 10—1 Beechnut 24 net

Dec. 27—50 " 10— Beechnut Harry Weissinger T. Co.
 24—10 %—2—3/5

1902.

March 20—40 " 10—1 Beechnut 24—24

May 31—20 " 10—1 Beechnut Harry Weis. T. Co. 24—

July 14—25 " 10—1 Beechnut Harry Weis. Tob. Co. 24
 —3—6/10 Del. 20 2/5

July 21—25 " 10—1 Beechnut 2½ oz. Harry Weissinger
 Tob. Co. 25—10 % Deld 22½

Aug. 25—50 " 10—1 Beechnut 2½ oz. Harry Weissinger
 Tob. Co. 25—10 % Deld 22½

Sept. 22—50 " 10—1 Beechnut 2½ H. W. Tob Co. 25—
 22½

1903.

April 18, 1903—1—100—Beechnut 2½ oz. Luhrman & Wilbern T.
 Co.—24 D. 24.

These entries in the records of Allen Kirkpatrick & Company are in my handwriting, and were made at or about the time the "Beech Nut" tobacco was received from the manufacturer.

These cost or price books form a part of the permanent records of this office, and the entries therein were made by me in due course of business.

CROSS-EXAMINATION.

By MR. HINTON:

XQ. 1. What was your capacity in Allen Kirkpatrick Company for the years 1901 to 1903?

A. I was buyer and general clerk.

XQ. 2. Did you continue to be buyer after 1903. That is, how long?

A. Up to the present moment.

XQ. 3. You are still buyer?

A. Yes, sir.

XQ. 4. Do you know why the Allen Kirkpatrick Company did not buy any tobacco manufactured by Luhrman & Wilbern or Harry Weissinger Tobacco Company under the name "Beechnut" after the year 1903?

A. Do I know why they did not buy during those years? I presume the reason was that it was taken over by another tobacco company.

XQ. 5. When was it taken over by another tobacco company; do you know?

A. I can't answer that without looking at the records.

XQ. 6. Assuming that this brand had been taken over by another tobacco company, would that account for the fact that Allen Kirkpatrick & Company did not buy any more of it after 1903?

A. Please repeat that question.

(Question read.)

A. Well, I think we did buy more of it after 1903.

XQ. 7. You think you did?

A. Yes.

XQ. 8. But you haven't any records, have you?

A. Our official cost book will show. That is the complete accurate record of all the purchases from that time to this date.

XQ. 9. Your cost books have been produced in evidence in the form of certain copies therefrom and I have just examined these cost books and do not find

any purchases of tobacco under the name "Beechnut" after the year 1903. If this examination was accurate, would that indicate that your concern did not buy this tobacco after 1903?

A. We have bought the tobacco after 1903.

XQ. 10. And prior to 1915?

A. I would have to look at the records to be certain as to that statement. The records are complete.

XQ. 11. Do these records to which you refer comprise these books out of which these entries have been copied?

A. They do.

XQ. 12. These are your cost books?

A. Those are our cost book records.

XQ. 13. They contain entries up to 1908 and 1909, if my examination is correct?

A. Yes, sir. They contain them not only for the years you mention, but right up to the present moment. Now, you understand, it is a loose leaf book; some of the pages have been put in the transfer bindings, but the records are complete.

XQ. 14. In other words, those books there are complete records?

A. Yes, sir, absolutely.

XQ. 15. It is a fact, isn't it, that those books do not contain a record of any purchase of tobacco under the name, "Beechnut" after the year 1903? At least, I have been unable to find any in the books, and I have just examined them.

A. You say after 1903. Do you mean after that date up to the present time?

XQ. 16. Yes, for 1903 and prior to 1915.

A. I would have to examine the books myself to make a positive statement on that.

XQ. 17. Would you mind looking them over? (To Mr. Cavanagh.)

(Mr. Cavanagh states that he has examined the record books that were submitted by Allen Kirkpatrick & Company and referred to by the witness, and finds no entries therein concerning the sale of "Beechnut" tobacco to Allen Kirkpatrick & Company after 1903 and until 1915.)

By MR. HINTON:

XQ. 18. Mr. Nichol, how much personal recollection have you of the dealings in this "Beechnut" tobacco purchased by your concern around 1903, besides what you gather from these old records?

A. Well, I am not and was not the tobacco buyer, and my knowledge of it would be simply the record as it is recorded in the books.

XQ. 19. Who was the tobacco buyer at that time?

A. Mr. Charles C. St. Clair.

XQ. 20. Where is he located now?

A. Right here.

XQ. 21. Is he still tobacco buyer?

A. He is.

XQ. 22. You have no personal knowledge, then, of the reason that Allen Kirkpatrick & Company stopped buying "Beechnut" tobacco in 1903, if they did so stop?

A. No personal knowledge; no.

XQ. 23. You never, then, attempted to buy this tobacco or know of such an attempt being made prior to 1915, which attempt was unsuccessful?

A. I can't answer, because I was not the buyer—not the tobacco buyer.

W. H. NICHOL.

CHARLES C. ST. CLAIR,

a witness produced on behalf of P. Lorillard Company,
being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. CAVANAGH:

Q. 24. Please state your name, age, residence and occupation.

A. Charles C. St. Clair; age 50 years; residence, 1924 Perrysville Avenue, North Side, Pittsburgh, Pa., buyer, wholesale grocery business, Allen Kirkpatrick & Company.

Q. 25. How long have you been buyer for Allen Kirkpatrick & Company?

A. Twenty-five years.

Q. 26. Do you recollect ever purchasing "Beechnut" tobacco from that concern?

A. I do.

Q. 27. From what concern?

A. My first recollection is Lührman & Wilbern Tobacco Company.

Q. 28. Will you please state in your own words, exactly what your recollection is as to the purchase of tobacco under the brand or name "Beechnut?"

A. I recall very definitely buying frequently "Beechnut" tobacco from Lührman & Wilbern Tobacco Company, and we bought it in pretty large quantities later on from P. Lorillard Company. I don't know just the dates; I haven't got that in my mind. Those are the only two concerns that I remember buying distinctly "Beechnut" tobacco from.

Q. 29. Do you recollect buying any "Beechnut" tobacco from Harry Weissinger, personally?

A. I do not.

Q. 30. State the reason, if you know it.

A. There was another buyer prior to that time that looked after the tobacco business entirely.

Q. 31. What did your concern do with the "Beechnut" tobacco that it bought from Luhrman & Wilbern?

A. We sold it to the retail trade.

CROSS-EXAMINATION.

By MR. HINTON:

XQ. 32. Do you know when your company stopped buying "Beechnut" tobacco from Luhrman & Wilbern?

A. I can't tell you that without referring to the records.

XQ. 33. You have no recollection of why your company stopped buying "Beechnut" tobacco?

A. I have not.

XQ. 34. Can you make any supposition as to the reason?

A. Well, my only opinion would be that they were unable to get it; it was not manufactured; no other reason that I know of.

XQ. 35. Can you recall at all, Mr. St. Clair, when Allen Kirkpatrick—or about when they stopped buying "Beechnut" tobacco from Luhrman & Wilbern Company?

A. No, I cannot. If you had asked me privately I would have said that we have been buying it all these years. I did not recall that it was off the market.

XQ. 36. Your cost records on that would be accurate, I suppose?

A. Absolutely. We enter every foreign bill that we get in our Cost Book. There is no question about that.

XQ. 37. I understand that you keep your correspondence in letter press books.

A. Yes, sir.

XQ. 38. And have done so since when?

A. Well, now prior to my time. To my knowledge twenty-nine years.

XQ. 39. And the letters that you received, how long do you keep those?

A. They are filed away by months and those are kept in these cabinets here for I think five months. I think that is all they will hold. Then they are transferred to "Jumbo" letter files. Those are filed away upstairs.

XQ. 40. How long do you keep them?

A. I may say six years. When they get too numerous we simply take the old ones and destroy them. We feel that they are of no value after six years.

XQ. 41. You don't conduct a retail business, do you?

A. No, sir.

CHAS. C. ST. CLAIR.

(The direct testimony of William M. Gormly, a witness called on behalf of P. Lorillard Company, is hereby stipulated as follows, subject to cross-examination, the introduction in evidence of the record book referred to by the witness being waived.)

WILLIAM M. GORMLY,

being first duly sworn, deposes and says as follows:

I am of lawful age, a resident of Pittsburgh, Pennsylvania, and am buyer with S. Ewart Company, 921

Liberty Avenue, Pittsburgh, Pennsylvania. This concern, S. Ewart Company, is engaged in the wholesale grocery and tobacco business, and does a large wholesale and jobbing business in Pennsylvania and neighboring states. I have been connected with this concern for about thirty years and am familiar with its method of doing business, its trade and its records.

I know that S. Ewart Company purchased and sold tobacco under the name and brand "Beechnut," beginning about 1901 and for several years thereafter, and that since 1915, to and including the present year, it has continuously purchased and sold large quantities of tobacco under the name or brand "Beechnut," which is manufactured by and obtained from P. Lorillard Company.

Recently, I had occasion, at the request of a representative of P. Lorillard Company, one Mr. A. C. Hursh, to examine certain old records of the S. Ewart Company for the purpose of endeavoring to ascertain when and from whom the S. Ewart Company purchased tobacco under the name or brand, "Beechnut." As a result of this examination of the records of S. Ewart Company, and which records were kept in due course of business, I find that the price or cost book of this concern shows the following purchases of "Beechnut" tobacco from the Harry Weissinger Tobacco Company, of Louisville, Kentucky, on the dates herein mentioned. For the sake of convenience, I now set forth in this affidavit a copy of the entries appearing in this price book:

Louisville, Ky., July 25th, 1901. Page 627.

Harry Weissinger Tobacco Co. 2%

15 Cases Beech Nut 2½ oz 20,—300,—24—72. Deld		20—200	
Nov. 12	10 Cases Beech Nut		
1902.			
		20 lbs Free 180—24—43.20	Deld
Feb. 4	20 "	20 "	105 180—24—43.20 "
"	11 25 "	25 "	10c 225—25 fol 627 64.00

Louisville, Ky., Feb. 18th, 1902. Fol. 627.

Harry Weissinger Tobacco Co. 2%

30 Cases Beechnut 2½ oz 30 lbs Free 270.24		64.80 Deld	
May 10	50 "	10 lb 50 "	108.00 "
"	15 50 "	" " 50 "	180.00 "
Aug. 14	30 "	" " 30 "	6.75 60.75 "
Sept. 4	30 "	" " 30 "	6.75 60.75 "
Nov. 14	30 "	" " 30 "	6.75 60.75 "
Dec. 27	40 Boxes	" " 40 "	360.35 10% 9.00 81.00 "

I have been shown a package of "Beechnut" tobacco with the representation of a red squirrel thereon, and bearing the name, "Harry Weissinger Tobacco Co.," and which is marked "P. Lorillard Co. Exhibit No. 14," and to the best of my recollection, knowledge and belief, it is similar to such "Beechnut" tobacco packages as were purchased from Harry Weissinger Tobacco Company by S. Ewart Company in the years 1901-1902, and which were sold by the S. Ewart Company to the trade.

I have to submit herewith a package of "Beechnut" Chewing and Smoking Tobacco, which I have marked "P. Lorillard Co. Exhibit No. 17." It will be noted that this package of tobacco bears the word "Beechnut," the picture of a squirrel and the words, "Harry Weissinger Tobacco Co., Incorporated, Luhrman & Wilbern Tobacco Co., Successor." It will further be noted that the cancellation on the revenue stamp bears the date April 6, 1905. This package of tobacco, Exhibit No. 17, has been in the sample case of S. Ewart Company for many years. On June 3rd, 1920, I took this package of "Beechnut" tobacco from the sample case, along with a similar old package of "Beechnut" tobacco, the revenue stamp of which bore the cancellation date of May 3, 1905. Both these old packages are similar to or *facsimile* specimens of "Beechnut" tobacco which was bought and sold by S. Ewart Company around about the period of 1905, the cancellation dates of the revenue stamps. Packages like Exhibit No. 17 were, to the best of my recollection and belief, purchased from the Luhrman & Wilbern Tobacco Co., the concern whose name appears upon the Exhibit package.

I have also been shown P. Lorillard Company Exhibit No. 16, and can state that this is similar to the package of "Beechnut" tobacco which I have been purchasing on behalf of S. Ewart Company from the P. Lorillard Company since 1915, in large quantities, and am so purchasing at the present time.

I might further say that the cost book or record above referred to, and from which the entries have been copied, is very large and bulky, being of the general dimensions of a large ledger, and it forms a part of the permanent records of this office. The

entries, so far as concerns "Beechnut" tobacco, appearing therein, in 1901 and 1902, were made by Mr. H. H. Arnold, and I am familiar with his handwriting.

CROSS-EXAMINATION.

By MR. HINTON:

XQ. 42. How long have you been tobacco buyer for S. Ewart Company?

A. Well, full line, ten years.

XQ. 43. Who was tobacco buyer prior to your coming with the Company?

A. J. S. Arnold.

XQ. 44. Did you have charge of the tobacco buying of S. Ewart Company in any way prior to 1910?

A. Yes, in a way, but not as a full line.

XQ. 45. Where is J. S. Arnold at the present time?

A. J. S. Arnold is at Atlantic City.

XQ. 46. Can you give me his address?

A. Why I can get it for you. I understand he has left this year; he has retired.

XQ. 47. Do you know what he is doing?

A. Nothing; walking the boardwalk.

XQ. 48. He is broken down in health, is he?

A. No, not exactly; but he retired several years ago and went to Atlantic City.

XQ. 49. He was buyer prior to 1910?

A. He was one of the firm; the firm was then S. Ewart & Company; Samuel Ewart and J. S. Arnold.

XQ. 50. He was one of the partners?

A. Yes, he was the active member.

XQ. 51. You have produced a package of tobacco, Lorillard Exhibit No. 17. Will you please state fully where you got this package of tobacco?

A. Out of that old drawer of samples downstairs, that has been out of use—the drawer as a sample drawer has been out of use for ten years.

XQ. 52. What are the contents of that sample drawer?

A. Samples of various manufacturers' cut and dry.

XQ. 53. What is the condition of the drawer?

A. Of the drawer?

XQ. 54. Or of the samples that are in the drawer?

A. I guess they are pretty well dried out now, and the drawer was full until such time as we abstracted the "Beechnut."

XQ. 55. I noticed in that drawer, which you kindly showed me, a large number of packages of tobacco. Would you tell me how completely that line of tobacco in there represents the packages of tobacco which were on the market at the time Lorillard Exhibit No. 17 went into the drawer?

A. That drawer was supposed to be complete. Like all other sample cases, it never was.

XQ. 56. Was it nearly complete, in your opinion?

A. As complete as we could get it, because we would fill it up and some person would come and borrow one and put it in his pocket. It was supposed to be complete but never was.

XQ. 57. The drawer is nearly full at the present time. In your opinion, does it contain most of the samples that were originally in there?

A. I would think so.

XQ. 58. In other words, that drawer would give one a pretty fair idea of the kinds of packages of tobacco which were on the market when this Lorillard exhibit went in there?

A. It would give a very good idea of the different

kinds and different sized packages that we sold at that time.

XQ. 59. You have no intention of destroying that drawer, or breaking it up in any way, have you?

A. No definite intention now, except that it should have been done long ago.

XQ. 60. You are willing to preserve that drawer in its present condition for a little while, aren't you?

A. Well, until housecleaning.

XQ. 61. When will housecleaning be?

A. I don't know; as soon as we can get enough niggers to go to work.

XQ. 62. That drawer has been there in practically its present condition how long?

A. I guess about fifteen years. I know I have told people that have asked me several times for a package of tobacco to go there in that drawer and get some. They would take it on account of its age. That it wasn't my brand is the only thing that saved it.

XQ. 63. Have you any display case for tobaccos which you are now offering to the trade?

A. No; practically, no. There are some samples down there, but we are out of it more oftener than we have it and simply pay no attention to it.

XQ. 64. Have you any idea, Mr. Gormly, why the S. Ewart Company stopped buying "Beechnut" tobacco in packages corresponding to Lorillard Exhibit No. 17?

A. No, I don't know. Possibly just a lack of call for it.

XQ. 65. You have no definite recollection of that?

A. No.

XQ. 66. Mr. J. S. Arnold was in charge of those matters at about that time?

A. Yes, he had full charge of matters of that kind.

XQ. 67. How long do you preserve correspondence here?

A. I would hate to tell you. I found some the other day dated 1867.

XQ. 68. You are in the custom of preserving all your old correspondence?

A. Not if we have to look it up, we don't.

XQ. 69. You mean by that, that if you are asked to find it, it is destroyed?

A. Nothing doing on that.

XQ. 70. Well, just for general information, do you classify your correspondence, when it is filed away, by the name of the person to whom the letter is addressed?

A. We file everything in a cabinet file and when that file gets full, we put it in the transfer, and when we get a pile of them, case them and put them away.

XQ. 71. That correspondence is all more or less classified?

A. Oh, yes.

XQ. 72. So that you could pick out correspondence of any particular concern if you wanted to do so?

A. Oh, it could be done; yes.

XQ. 73. Will you do me the favor, Mr. Gormly, of letting me know before you destroy that old drawer of "Beechnut" tobacco? Would you be willing to do that?

A. Why don't you buy it and be done with it? We are not going to destroy it, as far as I know.

XQ. 74. The reason I don't want to buy it is because it would not be of much value to me as evidence only as it is. I am perfectly willing to buy all the packages in there if you will keep them for me as they are.

A. We are not going to destroy it, I don't think.

We offered to give it away several times and no person would take it on account of its age. Then it wasn't my kind and I don't use it.

XQ. 75. You don't run a retail business here?

A. No.

RE-DIRECT EXAMINATION.

By MR. CAVANAGH:

RDQ. 76. Can you recall, Mr. Gormly, from what representative of the Weissinger company you first purchased "Beechnut" tobacco for S. Ewart Company?

A. John Davis.

RDQ. 77. Where was he located?

A. He was located here in the city. He was a resident agent.

RDQ. 78. For whom?

A. Weissinger.

RDQ. 79. And you first bought from John Davis?

A. Yes.

RDQ. 80. And subsequently from Luhrman & Wilbern?

A. Yes, I have bought it—I don't recall the name. John Davis was the original man. He had been with J. & W. Jenkinson a great many years and left there on account of his health and got hold of Weissinger's account.

RDQ. 81. You don't preserve all the old records here, do you?

A. No.

RDQ. 82. What do you do with them?

A. Burn them up. Every once in a while we find an old box with a lot of old junk in it. I think that drawer was forgotten.

W. M. GORMLY.

It is further stipulated, by and between the parties hereto, that if H. H. Arnold were called as a witness on behalf of P. Lorillard Company, he would testify as is set forth under oath below, production and examination of this witness being waived.

COMMONWEALTH OF PENNSYLVANIA, }
COUNTY OF ALLEGHENY, } ss.:

H. H. ARNOLD,

being first duly sworn deposes and says as follows:

I am of lawful age, a resident of Pittsburgh, Pennsylvania, and have been connected with the S. Eward Company, 921 Liberty Avenue, Pittsburgh, wholesalers and jobbers of groceries and tobacco, for over thirty years.

I have been asked to examine a cost or price book of the S. Eward Company, for the period of 1901 and 1902, with particular relation to certain entries therein, covering the purchase of "Beechnut" tobacco from Harry Weissinger Tobacco Company. I may say that these entries covering "Beechnut" tobacco, as well as vast numbers of other entries in this book or record, are all in my handwriting and were made at or about the time the invoices for the goods were received.

H. H. ARNOLD.

Sworn to and subscribed before me, this 15th day of June, 1920.

CLARENCE A. WILLIAMS,
(Seal) Notary Public.
My commission expires January 19, 1923.

The direct testimony of T. F. Coyle, a witness called on behalf of P. Lorillard Company, is hereby stipulated as follows, subject to cross-examination, the production of the bound price lists referred to by the witness being hereby waived:

T. F. COYLE,

being first duly sworn, deposes and says as follows:

I am of lawful age, a resident of Pittsburgh, Pennsylvania and am a buyer, connected with Arbuckles & Company, 808 Liberty Avenue, Pittsburgh, Pennsylvania, which concern is engaged in the wholesale grocery business, with a trade extending through Pennsylvania and neighboring States. I have been connected with this concern for at least twenty-five years past, and have purchased vast quantities of goods for it, including tobacco of various brands.

I distinctly recall purchasing "Beechnut" tobacco for this concern in the early 90's and as late as 1908. This tobacco was first purchased by Arbuckles & Company from Harry Weissinger Tobacco Company, of Louisville, Kentucky, and subsequently from the Continental Tobacco Company and Luhrmann & Wilbern Tobacco Company.

Recently, I was asked by Mr. A. C. Hursh, a representative of P. Lorillard Company, concerning purchases of tobacco under the name or mark "Beechnut," in the early 90's, and referring to our permanent records, I find that our printed price lists, which are in the form of bound volumes, show that we had in stock and were offering for sale this "Beechnut" tobacco. The first mention of this "Beechnut" tobacco appears in our price list of November 2nd, 1901, and the last mention of "Beechnut" tobacco appears in our

printed price list of November 28th, 1908. These printed price lists were issued by Arbuckles & Company, and then fortnightly, and all the price lists for each year were bound in a single volume, each yearly volume being about four inches thick, eight inches wide and about one foot in length. In each weekly or semi-monthly price list, from November, 1901, to November, 1908, "Beechnut" tobacco, together with the price thereof, appears listed, and this means that we had this tobacco in stock and were ready to sell it to our customers.

Since 1915, to and including the present time, Arbuckles & Company have been continuously purchasing from P. Lorillard Company large quantities of "Beechnut" tobacco, like P. Lorillard Company Exhibit No. 16.

It is stipulated by counsel, that:

Witness on Cross-Examination testifies that he was handling, from 1901 to 1908, a very large number of items, possibly five thousand, and that he has no distinct personal recollection of dealings in the old "Beechnut" tobacco, except that he knows that he bought this commodity.

He has no knowledge of the reason for discontinuing the sale of the old "Beechnut" tobacco; but he does know that he bought the old "Beechnut" tobacco a great many times, like the Weissinger package, Exhibit No. 14, and the Luhrmann & Wilbern package corresponding to Exhibit No. 17; and that when an item appears in the price lists of Arbuckles & Company, that shows that that item is in stock. If they should happen to run out of the item for a week or two, it is stricken from the weekly price list of that week in which it was not in stock.

At the request of counsel for P. Lorillard Company, Mr. Hinton states on the record that he has examined several of the weekly and fortnightly price lists for the year 1901 and the year 1908, and finds therein the name, "Beechnut."

THOMAS F. COYLE.

The direct testimony of H. O. Evans, a witness called on behalf of P. Lorillard Company, is hereby stipulated as follows, subject to cross-examination, the production in evidence of the books referred to by the witness being waived:

H. O. EVANS,

being first duly sworn, deposes and says as follows:

I am of lawful age, a resident of Knoxville Borough, Allegheny County, Pennsylvania, and am buyer for the wholesale grocery firm of Thomas C. Jenkins Company, 16 Terminal Way, Pittsburgh, Pa. I was connected with this firm for twenty-four years. This firm of Thomas C. Jenkins Company was established in 1863; retired April 30, 1920, and did a large jobbing and wholesale business throughout Western Pennsylvania, Eastern Ohio and West Virginia. During my connection with this concern, I have had occasion to familiarize myself with its records and have purchased great quantities of goods for the company.

I know, of my own knowledge, that Thomas C. Jenkins Company purchased, kept in stock, and sold, "Beechnut" tobacco, particularly during the period covered by the years of 1901, to and including 1907.

I also know that Thomas C. Jenkins Company has continuously purchased tobacco, known to the trade as

“Beechnut” brand, from P. Lorillard Company since 1915, and is now so purchasing this “Beechnut” tobacco for their trade to April, 1920, from the P. Lorillard Company in large quantities, approximately about one hundred gross of ten cent packages per week.

I have recently had occasion, at the request of certain representatives of P. Lorillard Company, to examine the old records of Thomas C. Jenkins Company, for the purpose of endeavoring to ascertain when and from whom the Company purchased “Beechnut” tobacco.

As a result of the examination of these records, I find that in 1901 and 1902, the Thomas C. Jenkins Company purchased from the Harry Weissinger Tobacco Company, of Louisville, Kentucky, certain quantities of tobacco under the name or trade-mark, “Beechnut”; that in 1903, tobacco under the trade-mark or brand “Beechnut” was purchased from the Continental Tobacco Company; and that in 1904, 1906 and 1907, tobacco under the trade-mark or brand “Beechnut” was purchased from Luhrmann & Wilbern Tobacco Company. This tobacco was, of course, sold in due course of our wholesale business.

I have before me the cost records or books of the Thomas C. Jenkins Company, covering the periods above mentioned, that is, from 1901 to and including 1907, and for the sake of convenience, I now set forth in this affidavit a tabulated statement of the entries appearing in these records or cost books. I might say that these cost books or records were kept in due course of business and that most of the entries appearing therein, particularly those from 1901 to 1907, are in my handwriting. The entry appearing in 1901 was made by a party who is no longer connected with this concern and who is not available.

Harry Weissinger Tobacco Co.	
1901	
Oct. 8—10/10 Beechnut 2½ oz.—1 " free with ea. box 24 Del. 2% ch'd at 9# to box	
1902	
July 16—15/10 Beechnut 2½ oz.—1# free with ea. 10# 25 Less 10% chg'd as 9# box	
	Less 36/10c lb off bill per instructions their agent
Sept. 16—10/10 Beechnut 1 free ea. 10# .25 Less 10%	
Continental Tobacco Co.	
1903	
Jan. 17—20/20 Beechnut 2½ oz.—1 free with 10# @ .25 Less 10% .22½ del. 2%	
April 7—2/100 Beechnut 2½ oz. (20# free)	.24 "
Aug. 5—1/100 Beechnut 2½ oz.	.25 "
Nov. 14—1/100 Beechnut 2½ oz.	.24 "
Luhrman and Wilbern Tobacco Co.	
1904	
Jan. 15—1/100 Beechnut 2½ oz. .24 Del. 2% 100#—1/21/06	
1907	
Sept. 7—3/10 Beechnut 2½ oz. @ 26 Less 8% .23—Del. 2%	92

From my familiarity with the records of the Thomas C. Jenkins Company and from the fact that practically all of these entries were made by myself, I can state that following the usual practice, they were made in due course of business, on arrival of invoice.

I may further state that I distinctly recall, and can

therefore positively state, that Thomas C. Jenkins Company, during the period embraced by the years 1901 to 1907, inclusive, bought tobacco put up in packages bearing the name, "Beechnut," and with the names of the manufacturers thereon.

I also produce herewith, make a part of this affidavit, and mark as "P. Lorillard Company Exhibit No. 16," a package of "Beechnut" tobacco, such as Thomas C. Jenkins Company has been purchasing from P. Lorillard Company continuously and in great quantities since the year 1915, down to and including the present year of 1920.

I might state that our records do not show any purchases of "Beechnut" tobacco during the years 1908-1914, inclusive.

CROSS-EXAMINATION.

By MR. HINTON:

XQ. 83. Were you tobacco buyer in 1901?

A. No.

XQ. 84. What was your capacity with this house at that time?

A. 1901? Why—what is the first entry there under—

MR. CAVANAGH: That is October 8, 1901.

THE WITNESS: No, the first entry in my writing.

MR. CAVANAGH: That is 1902.

A. Well, at that time, I was probably working on the day books.

XQ. 85. You were a bookkeeper at that time?

A. Yes, on the day books.

XQ. 86. When did you become a buyer?

A. Let's see; I think it was 1914; I think it was shortly after the war began.

XQ. 87. Then you have no personal recollection of the dealings in "Beechnut" tobacco in the period 1901 to 1907, except as shown by these books?

A. Well, this 1902 is my entry here from the invoice. That is, this invoice from this firm here, see, is my entry.

XQ. 88. Who was the buyer at that time?

A. Mr. T. Clifton Jenkins.

XQ. 89. Do you know why the Jenkins Company stopped buying "Beechnut" tobacco after 1907 up to 1915?

A. While the record doesn't show that they did buy it, that record does not prove that they did not buy it. The entries here will show that it was a very small factor in our business. The entries show that we bought it in 100 pound lots; that is a very small item for tobacco, and if we should drop any tobacco that we purchased in 100 pound lots, it is not a factor in our business, accustomed as we are to buy in ear-load lots. If we should stop buying any tobacco at all that we buy in five or ten case lots, it means nothing at all, because we pick up more than that every day in jobbing trades.

XQ. 90. You have no personal recollection of having stopped buying or why they stopped buying it, or anything of the kind?

A. I don't say that we had stopped buying; the record doesn't prove anything.

XQ. 91. You have no personal recollection?

A. No.

XQ. 92. How long do you preserve your correspondence here?

A. Oh, let's see—maybe two years.

XQ. 93. You destroy everything that is more than two years old?

A. Some records, yes; probably letters, useless letters, etc. There would be some files like this—of course this isn't a correspondence file—this cost record goes back to '97; but our letters would be destroyed every two years—useless letters.

XQ. 94. Supposing you had correspondence with the Weissinger Tobacco Company—

A. We don't have it.

XQ. 95. You never had it?

A. We don't have it.

XQ. 96. Suppose you had had, in 1908-9, in that period, would you be apt to have it?

A. We wouldn't have it at all. We moved over here from Penn Avenue about eleven years ago, and we had a clean-up of files at that time; and then, after coming over here, we put in new filing cases—cleaned out the old stuff then, and it has been gone over every two or three years since. We have been over here eleven years.

XQ. 97. Where is Mr. T. Clifton Jenkins?

A. He left for home about a half hour ago.

XQ. 98. He is still here?

A. Yes.

XQ. 99. You are a wholesale concern?

A. You are speaking of the Thomas C. Jenkins Company? They retired, you see, on April 30th.

XQ. 100. You say you are a wholesale concern?

A. We were a wholesale concern; yes.

XQ. 101. In the period 1901 to 1907?

A. Yes, until 1920.

XQ. 102. Wholesale exclusively?

A. Yes.

RE-DIRECT EXAMINATION.

By MR. CAVANAGH:

RDQ. 103. Mr. Evans, on what theory are these entries made? Is an entry made every time an article is purchased?

A. Whenever there is any change, either in the size of the case, size of the package, price or terms, or the supplier—whenever there is any change of record necessary to indicate a different person bought from, or a difference, a change in terms, different price, different size package or different size case.

RDQ. 104. So that, so far as this record is concerned, there might have been other purchases of "Beechnut," which are not shown?

A. Yes; this record does not prove that we stopped buying. The entries prove that they were bought at that time.

RE-CROSS-EXAMINATION.

By MR. HINTON:

RXQ. 105. Can I see your last entry here of "Beechnut" tobacco?

A. What is the name of the firm?

MR. CAVANAGH: Luhrmann & Wilbern.

A. Is this it? (Referring to book.) That isn't our last record, you know; that is our last entry in this book. That check mark I put at the end of all the records, when we changed our system over to cards. We started our system and transferred the records over to cards after this.

RXQ. 106. Then, you have additional records beyond this?

A. Yes; do you want to see them?

RXQ. 107. I would like to, if you have them handy.
handy.

Witness produces other records, on four cards, which are examined by counsel.

A. I don't have any stock records previous to 1917.

RXQ. 108. You have no other records between this book and 1917?

A. No; the stock cards would have proven that, but they are destroyed. Did you see these? (Referring to cards.)

RXQ. 109. I saw those.

A. I think that is what we had the other day.

RE-RE-DIRECT EXAMINATION.

By MR. CAVANAGH:

RRDQ. 110. These cards that you have produced, 1915, 1917 and 1919, show purchases of "Beechnut" from P. Lorillard Company?

A. Yes. That follows the record here, doesn't it? (Referring to book.)

RRDQ. 111. I am not sure.

Witness examines book.

A. When did Lorillard—

RRDQ. 112. 1915.

A. Well, that is probably when Lorillard's started in that size package, I guess—(Referring to card)—different sized cases or something, you see—yes, there you are—they were in 100 pound cases previously.

H. O. EVANS.

IN THE UNITED STATES PATENT OFFICE.

P. Lorillard Company

v.

Beech-Nut Packing Company.

Trade-Mark Opposition No. 2805.

"Beech-Nut."

NOTARY'S CERTIFICATE.

STATE OF PENNSYLVANIA, }
COUNTY OF ALLEGHENY, } ss.:

I, Clarence A. Williams, a Notary Public in and for the County of Allegheny, State of Pennsylvania, do hereby certify that the foregoing depositions of W. H. Nichol, Charles C. St. Clair, William M. Gormly, H. H. Arnold, T. F. Coyle and H. O. Evans were taken on behalf of P. Lorillard Company pursuant to agreement and by consent, before me, at Pittsburgh, County of Allegheny and State of Pennsylvania, on the 9th day of June, 1920; that the witnesses were by me each duly sworn, before the commencement of his testimony; that the testimony of each witness was taken, in my presence, in shorthand by Miss Bertha L. Gauvin, a shorthand reporter, and by her reduced to typewriting; that the foregoing pages contain a true and accurate transcript of her stenographic notes; that the opposing parties were represented by counsel during the taking of said testimony; that said testimony was taken at Pittsburgh, Pennsylvania, and was commenced at 11 o'clock A. M. on the 10th day of June, 1920, and was concluded on the same day at about 5.30 o'clock

P. M.; that the deposition of each witness was read to or by such witness before the witness signed the same; that I am not connected by blood or marriage with either of said parties, or interested directly or indirectly in the matter in controversy.

In testimony whereof I have hereunto set my hand and affixed my seal of office at Pittsburgh, County of Allegheny, State of Pennsylvania, this 15th day of July, 1920.

CLARENCE A. WILLIAMS,

(Seal.)

Notary Public.

My commission expires January 19, 1923.

Met pursuant to agreement at Middletown, Ohio,
this 10th day of June, 1920.

Present: R. B. CAVANAGH, on behalf of P. Lorillard
Co.;

SEBASTIAN HINTON, on behalf of Beech Nut
Packing Co.

HERBERT C. BOYKIN,

a witness called on behalf of P. Lorillard Co., being first duly sworn by J. V. Bonnell, Notary Public and acting examiner by consent, deposes and says as follows, and with formal notice of the production of this witness being waived.

Q. 1. Please state your name, age, residence and occupation?

A. Herbert C. Boykin, of lawful age, No. 507 Vandever St., Middletown, O., Tobacco Manufacturer, I am General Manager of the P. Lorillard Co., Middletown Branch, at Middletown, Ohio.

Q. 2. What does P. Lorillard Co. manufacture at this branch?

A. Scrap tobacco and plug tobacco and smoking tobacco.

Q. 3. How long have you been engaged in the tobacco manufacturing business?

A. About forty-seven years; a good long while, anyway.

Q. 4. Will you please state with what concerns you have been associated, giving them in order as near as you can recollect?

A. The first concern I worked with was Solomon Hancock of Richmond, Va., about 1872; in 1881 I came here to Middletown, Ohio, with The Wilson McCallay Tobacco Co., in 1902 I came with The American Tobacco Co. and have been right here with this business ever since.

Q. 5. In 1902 when you say you came with The American Tobacco Co., where and under what name was the plant known at that time?

A. This plant we are in at present, which is now and has been since 1911 known as the P. Lorillard Co., Middletown Branch, was when I came here in 1902, known as the P. J. Sorg Branch of The American Tobacco Co., Luhrman & Wilbern Tobacco Co., were located at this plant, but were run as a separate business.

Q. 6. Will you name the brands of tobacco which are manufactured at this P. Lorillard Co., Middletown Branch?

A. Polar Bear, Honest Scrap, Beech Nut, Old Nut, Scrap Iron, Bag Pipe.

Q. 7. How long have you known the Beech Nut brand of tobacco to be manufactured here at this factory at Middletown?

A. Since 1904 if I remember right.

Q. 8. Has it been manufactured every year since that date?

A. No, I think there were four or five or maybe six years when it was not manufactured.

Q. 9. Do you recollect in what years this Beech Nut brand of tobacco was not manufactured?

A. I think it was 1909, 10, 11 and 12, somewhere along in there, I would not be positive.

Q. 10. Do you know why this Beech Nut Tobacco was not manufactured here during that time?

A. Simply for the lack of orders.

Q. 11. Presuming an order had been received, what would you have done?

A. We would have made it.

Q. 12. State whether or not you had on hand at that time the materials necessary for making this Beech Nut tobacco?

A. We did.

Q. 13. What did you have on hand for this purpose?

A. We had the bags, the formula for making the tobacco.

Q. 14. Could you make Beech Nut Tobacco out of formula and bags?

A. Of course we had the tobacco.

Q. 15. I hand you herewith a package which has been introduced in this case as P. Lorillard Co. Exhibit 17 and ask you if you can identify it, and if so tell me what it is?

A. Yes, I identify it as the Beech Nut we made in those days.

Q. 16. Who made it?

A. The Luhrman & Wilbern Tobacco Co.

Q. 17. When you use the expression those days, just exactly when do you mean?

A. The Revenue Stamp showed 1905.

Q. 18. Where was tobacco like this package made?

A. Right here in this factory at Middletown.

Q. 19. How do you know that packages of tobacco like this Exhibit 17 were made here in the factory at Middletown?

A. By the cancellation of the stamp.

Q. 20. Do you personally know that tobacco like that was made here?

A. I could not swear to that, tobacco was made here, but we have every reason to believe it, the cancellation is a Luhrman & Wilbern cancellation.

Q. 21. Were you connected with this factory in 1905?

A. Yes.

Q. 22. What tobacco was made at this factory in 1905?

A. Polar Bear, Beech Nut, Bag Pipe I think was made here.

Q. 23. How was the Beech Nut packed in 1905?

A. In 2½ oz. bags similar to this Exhibit 17, that you have there.

Q. 24. How do you know that Beech Nut Tobacco at that time was packed or put up like Exhibit 17?

A. Because by seeing it manufactured.

Q. 25. How long have you known of Beech Nut Tobacco?

A. I heard of it during Harry Weissinger's time in 1900.

Q. 26. Can you give us a general idea of the amount of Beech Nut Tobacco manufactured and shipped from this Middletown factory at the present time?

A. We have made as much as 150,000 pounds daily, we have also shipped this much and more per day.

Q. 27. State if you can what concern is recognized in the tobacco industry today as the manufacturer of Beech Nut Tobacco?

A. Middletown Branch, P. Lorillard Co.

Q. 28. What company is recognized as the manufacturer of Beech Nut Tobacco?

A. P. Lorillard Company.

(Direct examination closed.)

CROSS-EXAMINATION.

By MR. HINTON:

XQ. 29. Will you please describe what you meant when you said in answer to question 5 that Lührman & Wilbern Tobacco Co. was run as a separate business?

A. They were bought by the American Tobacco Co. from the Lührman & Wilbern Tob. Co., Cincinnati, Ohio, and moved to this building, I think, in 1901, and run as a separate business. And under that name for several years after the purchase by the P. Lorillard Company, which was in 1911.

XQ. 30. Do you mean that for several years after P. Lorillard Co. purchased Lührman & Wilbern Co., P. Lorillard Co. continued to run Lührman & Wilbern Co. as a separate business?

A. Well, I could not say how they run it.

XQ. 31. You said in your direct examination that the Lührman & Wilbern Tob. Co. was run as a separate business, I am not interested in question of ownership, of stock or the like, I am interested in the manner in which the Lührman & Wilbern business was run

at this factory. Will you please explain with reference solely to the operations at this factory, how the Luhrman & Wilbern business was run as a separate business?

A. The business was run separately, all under the management of one company, which at that time was The Continental Tobacco Co.

XQ. 32. Who was manager in 1902?

A. Mr. George Schaefer.

XQ. 33. When did you become manager?

A. In 1911.

XQ. 34. Was the advertising of the brands put out by Luhrman & Wilbern distinct from the other brands made here?

A. Not that I know of.

XQ. 35. Did the placards or posters if there were any circulated to advertise the Luhrman & Wilbern brand contain the name Luhrman & Wilbern?

A. Anything they put out had their name.

XQ. 36. The books were kept separate?

A. Yes.

XQ. 37. Correspondence was kept separate?

A. Yes.

XQ. 38. Was there a special force here in the office and the factory looking after the Luhrman & Wilbern business?

A. Yes.

XQ. 39. Was there a special part of the factory devoted to the manufacture of Luhrman & Wilbern products?

A. Yes, there was, they paid regular rent to the American Tob. Co.

XQ. 40. What was your capacity in this place during the years 1909, 1911 when you began managing?

A. I was superintendent.

XQ. 41. I suppose from the period of 1909 to 1914, inclusive, you received many thousands of orders did you not?

A. I could not answer that question.

XQ. 42. Don't you know as a fact that you did?

A. No.

XQ. 43. How much personal contact in the years 1909 to 1914 did you have with the orders which came in here?

A. I did not see the orders at all.

XQ. 44. What do you base your statement that there were no orders received during this period or part of it for the Beech Nut Tobacco similar to P. Lorillard Exhibit No. 17?

A. Our books will show if we shipped during that time.

XQ. 45. If books would show whether you shipped any, but your books would not show whether any orders were received would they?

A. No.

XQ. 46. May I ask you again then upon what you base your statement that no orders were received for Beech Nut Tobacco, similar to P. Lorillard Exhibit No. 17?

A. We did not manufacture any at that time.

XQ. 47. What was the course of the orders received at this factory?

A. Addressed to the firm and anyone designated to open the mail, the orders come in triplicate and from then it goes to the order man.

XQ. 48. Did such orders ever come to your personal attention in the years 1909 to 1914?

A. Yes, but I do not remember any particular order.

XQ. 49. In how large a batch was this Beech Nut Tobacco subsequently packed to correspond to P. Lorillard Exhibit No. 17, manufactured at this factory during the years 1909 and 1914?

A. There was not any during that time.

XQ. 50. When it was being manufactured, I suppose it was manufactured in batches, was it not?

A. Yes.

XQ. 51. How large were those batches?

A. That depended on the size of the order, from 100 lbs. up.

XQ. 52. Was 100 lbs. the smallest batch?

A. That would be the smallest.

XQ. 53. How much of a stock of bags similar to P. Lorillard Exhibit 17 did you have on hand here after 1909, do you recollect?

A. I could not answer that question, we usually have several million bags.

XQ. 54. Do you mean at the present time?

A. We usually have a millon or so of bags on hand of most any brand.

XQ. 55. Did you ever have occasion to investigate how many bags, corresponding to Lorillard Exhibit No. 17 you had on hand during 1909 and 1914?

A. No.

XQ. 56. I notice that on plaintiff's Exhibit No. 17 Luhrman & Wilbern Tob. Co. are indicated to be the successor of Harry Weissinger Tob. Co., in your knowledge of tobacco sales what was the reason for this statement appearing on this?

A. I cannot answer this question.

XQ. 57. Do you suppose it would have any influence on the sales of the tobacco?

A. I would think that would be the reason.

XQ. 58. In order that customers recognizing the package put out by Harry Weissinger Tobacco Co., P. Lorillard Exhibit No. 14 and would recognize P. Lorillard Exhibit No. 17 as being the same stuff? Would that be the reason?

A. I would think so.

XQ. 59. What becomes of correspondence from jobbers and dealers received at this factory?

A. We keep them so long, and then destroy them.

XQ. 60. How long do you keep them?

A. I do not know.

XQ. 61. Do you follow the same practice with orders?

A. I could not answer this question.

XQ. 62. As far as you know you then still have, except for individual accidents, all the orders which have been received at this factory?

A. I do not know, our bookkeeper could answer those questions.

XQ. 63. I call your attention to a bag of tobacco, P. Lorillard Exhibit No. 16, where was this and similar bags made?

A. All made by the Western Paper Goods Co.

XQ. 64. Where are they located?

A. Cincinnati, Ohio.

XQ. 65. Who got up this bag?

A. I do not know.

XQ. 66. Did you have anything to do with it?

A. Not a thing.

XQ. 67. Where was it gotten up?

A. I do not know that.

XQ. 68. Do you know whether it was gotten up here at Middletown?

A. I know it was not.

XQ. 69. Now Mr. Boykin in what form did you receive instructions then being manager of this factory, to manufacture Serap Tobacco pack it in bags similar to P. Lorillard Exhibit No. 16, ship it or sell it?

A. They sent Mr. Thomas Smith here to instruct myself how to manufacture this particular brand, we then received orders in the regular way for shipment to different customers.

XQ. 70. Who is Mr. Thomas Smith?

A. Manager of the Marion Branch of the P. Lorillard Co.

XQ. 71. And he told you how to put together the ingredients of this tobacco and pack it similarly to Lorillard Exhibit No. 16?

A. That was his business.

XQ. 72. Then you did not follow the same formula by which you had previously made the tobacco package in P. Lorillard Exhibit No. 17?

A. Neither in tobacco nor package.

XQ. 73. Did you circulate from this factory through the trade, advertising or posters, placards or the like for the purpose of advertising the tobacco package similarly to P. Lorillard Exhibit No. 16.

A. No advertising done that I know of from this factory.

XQ. 74. Did you see any such advertising?

A. Whatever I seen in stores.

XQ. 75. Can you describe it?

A. A girl holding a package, occasionally I see empty cartons in a window.

XQ. 76. Would you say that this tobacco P. L. Exhibit No. 16 was extensively advertised or not?

A. I do not think it needed advertising, the quality of the tobacco was sufficient.

XQ. 77. It became immediately popular did it?

A. Wherever the chewer got a hold of it.

XQ. 78. Coming back to your instructions the manufacturer of this tobacco P. L. Exhibit No. 16 in 1915, were any of these instructions given you in writing?

A. They were from Mr. Thomas Smith.

XQ. 79. I suppose he gave you a new formula in writing and that you subsequently had in addition thereto other correspondence?

A. I had no other correspondence, except I received the formula from Mr. Thos. Smith in writing.

XQ. 80. The bags you got sent here on order originating elsewhere?

A. Yes.

XQ. 81. Mr. Boykin, have you absolutely no idea whatever as to who got up the bag P. L. Exhibit No. 16?

A. I do not know.

XQ. 82. Did you ever hear any talk about that?

A. No.

XQ. 83. Did you ever hear anybody connected with your company make a guess as to why this particular design was selected?

A. I never heard anything.

By MR. CAVANAGH: While counsel for P. Lorillard Co. is glad to give counsel for Beech Nut Packing Co. every latitude in cross-examination, it is not seen that such questions as XQ. 83 are within the scope of a proper cross-examination of this witness. At the time of opening depositions in this case on or about May 19, 1920, Mr. Offield, a partner of Mr. Hinton, and counsel for the Beech Nut Packing Co. was in the P. Lorillard Co. general offices in New York City, when the stipu-

lations covering advertising and the like of the Lorillard Beech Nut brand were entered into, and had he deemed it necessary he could have obtained first named all of the information now sought from this witness, as to the design of the bag, advertising and the like. P. Lorillard Co. has absolutely nothing to conceal in this respect, and if counsel for Beech Nut Packing Co. desires such information, counsel for the P. Lorillard Co. now informs him that upon return to New York he will be glad to obtain this information and furnish it to counsel of Beech Nut when available.

By MR. HINTON: Mr. Offield is not present, it is therefore requested that such remarks as he may wish to make in this connection may be inserted here in the record. I personally was not in the New York conference nor have I seen or otherwise obtained knowledge of any stipulations such as referred to, immediately above.

XQ. 84. Do you keep here at this factory a museum or collection of all kinds of packages of Scrap Tobacco which have been on the market?

A. No we do not.

XQ. 85. Do you know where there is such a collection?

A. No, I do not, I do not think there is such a one.

By MR. HINTON: In view of the witness' answers to XQ. 43, 44, 45, 46, 47 and 62, the witness' answer to Q. 10 of the direct examination is objected to as not the best evidence based on hearsay and as being a mere conclusion of the witness. (Cross-examination closed.)

By MR. CAVANAGH: In reply to Mr. Hinton's statement counsel for Lorillard Co. would say

that obviously the witness properly referred book record matters to the bookkeeper here, and such old records as are available will be produced at the witness Mr. Bowman, and the present witness' testimony from the manufacturing end at the factory appears to be competent.

RE-DIRECT EXAMINATION.

By MR. CAVANAGH:

RDQ. 87. Both P. Lorillard's Exhibit 17 and P. Lorillard Exhibit No. 16 are made up of Scrap Tobacco, are they not?

A. Yes.

RDQ. 88. Who has charge of the actual tobacco manufacturing of this factory?

A. I have.

(No cross-examination.)

(Deposition closed.)

HERBERT C. BOYKIN.

Middletown, Ohio, June 11, 1920.

Met pursuant to adjournment, parties present as before.

RALPH BOWMAN,

a witness called on behalf of P. Lorillard Co. being first duly sworn deposes and says in answer to questions asked him by Mr. Cavanagh as follows, formal notice of the production of this witness being waived.

Q. 1. State your name, age, residence and occupation?

A. Ralph Bowman, 36 years, No. 601 Tytus Ave., bookkeeper and cost clerk, assistant cashier of P. Lorillard Co., Middletown Branch, Middletown, Ohio.

Q. 2. In what business is P. Lorillard Co. engaged and what does it manufacture here?

A. Manufacturers of Scrap Tobacco, we manufacture Beech Nut, Honest Scrap, Polar Bear, Old Nut, Bag Pipe, Pan Handle, Scrap Iron and Natural Leaf at this factory here in Middletown.

Q. 3. Just what are your duties here at the factory?

A. My duties are to take care of all records.

Q. 4. How long have you been connected with this factory here at Middletown?

A. I have been connected with the factory here at Middletown for the past twelve years, I came to work here about 1908, and at that time the factory was known as the Luhrman & Wilbern Tobacco Co., since about 1911 it has been changed to the P. Lorillard Co., Middletown Branch.

Q. 5. How long to your knowledge has Beech Nut Tobacco been made and shipped from this factory?

A. Beech Nut has been manufactured and shipped from this factory since 1904 to the present time, with the exception of four years, 1911, 12, 13, 14.

Q. 6. Can you produce any books or records or other documentary evidence in connection with your last answer?

A. Yes, I produce books which were kept by our factory Superintendent, Mr. Willer, showing the pounds manufactured for the period from 1904 to 1910, inclusive. The book which I have marked with the letter "A" in red pencil is a stamp record book, which is a book in which a record is kept of the revenue

stamps which are used upon the packages of the various brands of tobacco. For example, in connection with Beech Nut Tobacco I refer to page 88 where the entry Beech Nut 1960 LBS. 15 oz. appears and opposite which I have placed a red check mark. This entry appears under the date of March, 1904. On page 187 appear entries for Beech Nut, under August, 1906, this being one of the last pages of this book. Other entries appear throughout the book intermediate these pages, which will be seen from an examination thereof. The entries in this book "A" extend down to August, 1906. I also produce a stamp record book, which I have marked "B" in red pencil and which begins in September, 1906, and extends down to June, 1910. This is a continuation of book "A." On page 2 of this book "B" I have checked in red pencil an entry referring to "Beech Nut" which appears under the heading date of September, 1906, and on page 270 of this book "B" I have placed a red check opposite an entry relating to Beech Nut which appears under the heading date of April, 1910. Other entries relating to Beech Nut appear throughout this book "B" intermediate this page. I also produce six sheets which were kept in our order department representing the shipments by months and the totals for the year of our various brands. I have fastened all of these sheets together with a brass tag, and have marked the letter "C" thereon, in red pencil, as well as numbering the pages in red pencil. For example will be seen that Beech Nut is shown on page 2 beginning with 1904 to page 4 for 1910.

I also produce a small record book which I have marked "D" in red pencil, and which is a record of shipments. The entries in this small book "D" begin

on the last page and run forward. It will be seen that the book begins with entries about 1901. So far as "Beech Nut" is concerned, on the sixth page from the back of the book, under the date of 1904, appear entries relating to this brand and on the page covering the dates for years 1909 and 1910, and through which I have run a brass tag, appears entries under the name Beech Nut.

Q. 7. In whose handwriting do the entries in these records appear, if you know? In answering this question I wish you would take up these records in the order in which you have produced the same, you may simply refer to these records by the letter by which you have designated them?

A. Book "A" was kept by our Superintendent Mr. Willer, book "B" was also kept by Mr. Willer, the handwriting with which I am familiar. Sheets marked "C" were kept by one of the clerks in our Order Department and I am not familiar with the handwriting. The records shown in book marked "D" were kept by Mr. E. A. Stahl, Mr. Weishaar and Mr. Hall, I am familiar with all these handwritings.

Q. 8. I hand you herewith a package which has been introduced as evidence in this case as P. Lorillard Exhibit 17, and will have to ask you if you can identify the same, and if so tell us what it is?

A. I identify this package of Beech Nut Scrap Tobacco as packed by us during the period from 1904 to 1910.

Q. 9. I hand you herewith package which is in this case as P. Lorillard Co. Exhibit 16, and ask you if you can identify the same and if so tell me what it is?

A. I identify this package of Beech Nut Tobacco as the package which we are now using for this brand,

we have been using this style package since 1915 to the present time.

Q. 10. I hand you a package of sheets which I have fastened together for convenience and marked with the letter "E" in red pencil, and ask if you can tell me what they represent?

A. The package of sheets marked "E" represent copies of invoices to our various customers, referring to Beech Nut brands.

Q. 11. What became of the original of these invoices?

A. The original invoices were forwarded to the customers on date of shipment.

Q. 12. From the standpoint of prominence and volume of sales how does Beech Nut brand, at the present time compare with the other brands which you make and ship from this Middletown factory?

A. We produce more Beech Nut than all of the other brands manufactured here, and the demand is much greater than our production and it is very hard for us to keep up with our orders for this brand.

By MR. CAVANAGH: The books "A," "B" sales sheets "C" and small book "D" and invoice sheets "E" are now offered in evidence, and are marked P. Lorillard Co. Exhibits No. "A," "B," "C," "D," and "E," respectively.

(Direct examination closed.)

CROSS-EXAMINATION.

By MR. HINTON:

XQ. 13. In examining the sheets "C" large which you have produced, I notice reference to Beech Nut tobacco, can you say of your own personal knowledge without reference to these sheets that Beech Nut to-

bacco packages corresponding to P. Lorillard Exhibit No. 17 was made at this factory prior to 1911?

A. Yes.

XQ. 14. You have a distinct recollection of this package Exhibit No. 17?

A. Yes.

XQ. 15. At that time a certain part of the factory was devoted to the manufacture of Luhrman & Wilbern Tobacco products, was it not?

A. Yes.

XQ. 16. How long did a special separate part of the factory continue to be devoted to the manufacture of Luhrman & Wilbern products?

A. Until 1911.

XQ. 17. What happened then?

A. The name was changed then to the Middletown Branch, P. Lorillard Co.

XQ. 18. I notice in these sheets that you have produced and marked "C" with reference to Polar Bear, Old Nut, Bag Pipe and Scrap Iron, were these Luhrman & Wilbern products?

A. Yes.

XQ. 19. Is P. Lorillard Co. still manufacturing and selling the four brands just referred to?

A. Yes.

XQ. 20. I purchased last night a bag of Polar Bear Tobacco; you handed me this morning an identical empty bag, is this the bag in which P. Lorillard Co. sells Polar Bear Tobacco?

A. Yes.

XQ. 21. This same tobacco was sold prior to the purchase of Luhrman & Wilbern by P. Lorillard, by the former company, was it not?

A. Yes.

XQ. 22. I wish you would examine the empty bag you have just identified and state how it compares with the bag in which Polar Bear Tobacco was sold by Luhrman & Wilbern?

A. The empty bag used for packing Polar Bear Scrap Tobacco was used by Luhrman & Wilbern Tob. Co. printed the same with exception the words P. Lorillard Co., successor.

By MR. HINTON: The bag referred to by the witness is produced, offered and introduced into evidence as Beech Nut X-Exhibit No. 1.

XQ. 23. Can you and will you produce at this session a specimen of the Polar Bear bag used by Luhrman & Wilbern Tobacco Co. prior to the acquisition of that company by P. Lorillard Co?

A. We have none of these bags on hand at this time.

By MR. HINTON: Counsel for P. Lorillard Co. is requested to furnish counsel for Beech Nut Packing Co. with specimens of the bags in which Luhrman & Wilbern sold Polar Bear, Scrap Iron, Old Nut and Bag Pipe.

By MR. CAVANAGH: Counsel for Lorillard Co. will be very glad, indeed, to furnish counsel for Beech Nut Packing Co. with any and all of the above specimens, if the latter are obtainable. On his return to New York he will have a search made and if the specimens turn up we will gladly furnish to counsel.

XQ. 24. I hand you a bag and ask if this is the bag in which P. Lorillard Co. at the present marketing Scrap Iron Tobacco?

A. Yes.

By MR. HINTON: The bag identified by witness is produced, introduced and offered in evidence as Beech Nut X-Exhibit No. 2.

XQ. 25. How does this bag compare with the bag in which Luhrman & Wilbern offered Scrap Iron Tobacco?

A. I cannot recall whether this bag is made up in the same manner as that used by Luhrman & Wilbern Tobacco Co.

XQ. 26. I am not interested in the fine type concerning the factory No. and notice at the bottom of the bag to which you referred just prior to your answer to XQ. 25 as it appears on the record. Can you not state excluding this fine type whether or not that bag is the same except for the printing P. Lorillard Co. successors, to that bag in which Luhrman & Wilbern offered Scrap Iron Tobacco?

A. If I remember correctly the bag was printed in different colors than now used and did not show P. Lorillard Co. as successors.

XQ. 27. In what colors was the Luhrman & Wilbern Scrap Iron bag printed?

A. I do not remember just what colors these bags were printed in at that time.

XQ. 28. You apparently have a very clear recollection of exactly the kind of packages in which Beech Nut Tobacco was packaged by Luhrman & Wilbern, according to these sheets "C" and other records appears that Scrap Iron sold considerably in excess of Beech Nut. How do you account for the fact that your recollection of the old Scrap Iron label is so vague and that of Beech Nut so clear?

Mr. Cavanagh now hands the witness the

large sheets "C" and he is instructed that he may examine these sheets in connection with XQ. 28 and ascertain if the statement of what those records show, as set forth by the counsel of the Beech Nut Co. is correct.

A. I recall the style of the Beech Nut bag as being the one used at that time, the only difference in the Scrap Iron bag is the colors used in printing.

XQ. 29. What were those colors?

A. I do not remember what the colors were.

XQ. 30. You have not available here any of those Old Scrap Iron bags used by Luhrman & Wilbern?

A. Not to my knowledge.

XQ. 31. Will you please investigate and see if you can find any counsel for P. Lorillard having expressed his willingness to have these produced?

A. Yes.

XQ. 32. Coming to a bag which bears the name Old Nut, is this the bag in which P. Lorillard is now selling Old Nut tobacco?

A. Yes.

(The bag identified by the witness is produced, introduced and offered as Beech Nut X-Exhibit No. 3.)

XQ. 32a. You have just produced a bag marked Polar Bear, is this the bag in which Luhrman & Wilbern Tobacco Co. sold this tobacco?

A. Yes.

(The bag identified by the witness is produced, introduced and offered in evidence as Beech Nut X Exhibit No. 1-A.)

XQ. 33. You have just handed me a bag marked Scrap Iron Scrap which is substantially larger than

Beech Nut Exhibit No. 2. Will you please state what the bag referred to is?

A. This bag was used first in the manufacture of Scrap Iron Scrap tobacco by Lührman & Wilbern Tobacco Co., and was later changed to the different style in printing.

(The bag identified by the witness is produced, introduced and offered in evidence as Beech Nut X Exhibit No. 2-A.)

XQ. 34. According to your recollection did not Lührman & Wilbern put out Scrap Iron tobacco in a package containing the name Lührman & Wilbern prior to the time P. Lorillard put out the package X Exhibit No. 2?

A. There was a bag used with the Lührman & Wilbern Tobacco Co. name thereon with the exception of P. Lorillard Co. successors, at that time it was printed stock owned by P. Lorillard Co.

XQ. 35. This last bag to which you have just referred was otherwise identical except possibly for the fine type referring to the Factory No. and so on, with Beech Nut X Exhibit No. 2, was it not?

A. Yes.

XQ. 36. Now what I want to know is was there not a bag substantially identical with X Exhibit No. 2 except that it did not contain the name P. Lorillard Co.

A. Yes.

XQ. 37. And this last bag which you have described in answer to XQ. 36 immediately preceded on the market Beech Nut X Exhibit No. 2. Did it not?

A. Yes.

XQ. 38. You have stated that Beech Nut X Exhibit No. 3 is a bag in which P. Lorillard puts up Old

Nut tobacco; I understand that you have been unable to locate a specimen of the bag in which Luhrman & Wilbern put up this brand of tobacco. Is this correct?

A. Yes.

XQ. 39. Will you please state how the bag in which Luhrman & Wilbern put out Old Nut tobacco compared with the bag X Exhibit No. 3?

A. To the best of my knowledge Luhrman & Wilbern used the same bag which we are now using.

XQ. 40. I hand you a bag marked Bag Pipe, and ask you to state whether or not this is the bag in which P. Lorillard is now selling Bag Pipe tobacco?

A. Yes it is.

XQ. 41. I understand that you have been unable to find a specimen of the bag in which Luhrman & Wilbern put out Bag Pipe tobacco, is this correct?

A. Yes.

XQ. 42. Will you please state how the bag in which Luhrman & Wilbern put out Bag Pipe Tobacco compared with the bag you have just identified and which is produced, introduced and offered in evidence as Beech Nut X Exhibit No. 4?

A. To the best of my knowledge this is the same bag used by the Luhrman & Wilbern Tob. Co.

XQ. 43. To sum this up therefore, we have five brands altogether in which P. Lorillard is claimed to have succeeded Luhrman & Wilbern as follows: Polar Bear, Scrap Iron, Old Nut, Bag Pipe and Beech Nut. With respect to Polar Bear, Old Nut, Bag Pipe, and Scrap Iron P. Lorillard used the same bag as immediately prior to the change in the business by Luhrman & Wilbern except that where the old bag bore the name Luhrman & Wilbern, the name P. Lorillard was added thereto as successor.

With respect to Beech Nut the old package P. Lorillard Exhibit No. 17 was dropped and the package P. Lorillard Exhibit No. 16, adopted, is that correct?

By MR. CAVANAGH: The question is objected to as indefinite in the use of the word "dropped" if counsel is referring to the general dress of the package then he is asked to state so.

A. Yes.

XQ. 45. I understand that Beech Nut, Polar Bear, Scrap Iron, Bag Pipe and Old Nut were all the Lührman & Wilbern Scrap Tobaccos manufactured at this factory, is that correct?

A. Yes.

XQ. 46. What other brands of Scrap Tobacco were manufactured at this factory prior to the acquisition of Lührman & Wilbern by P. Lorillard Co.?

A. Honest Scrap, Natural Leaf, Pan Handle.

XQ. 47. To whom did those brands belong prior to the time that P. Lorillard Co. acquired Lührman & Wilbern?

A. I do not know.

XQ. 48. Were any of these three brands owned by P. Lorillard before the acquisition of Lührman & Wilbern by P. Lorillard?

A. Not to my knowledge.

XQ. 49. They were owned then by some company other than Lührman & Wilbern or P. Lorillard?

A. Yes.

XQ. 50. Was any change made in the Honest Scrap package at the time of the acquisition by P. Lorillard of this brand?

A. Not to my knowledge.

XQ. 51. Honest Scrap was always a big seller, was it not, since your connection with the business?

A. Yes.

XQ. 52. Have you not as definite a recollection of the Honest Scrap packages as you have exhibited with respect to Bag Pipe, Polar Bear, Scrap Iron and Old Nut?

A. Yes, but cannot recall all the printing as shown on the bags.

XQ. 53. You mean the fine type referring to the factory number and manufacturer's notice, if so let us disregard this entirely?

A. I do not refer just to the manufacturer's caution on these, but all of the printing on the bag.

XQ. 54. As a matter of fact, you are quite sure, are you not, that at the time P. Lorillard acquired Honest Scrap no substantial change was made in the packing?

A. Not to my knowledge.

XQ. 55. Is the same true of Pan Handle?

A. Yes.

XQ. 56. And Natural Leaf?

A. Yes.

XQ. 57. Mr. Boykin referred yesterday to a book-keeper who was expected to testify today; are you the bookkeeper?

A. Yes.

XQ. 58. Do you know whether the bags for Bag Pipe, Polar Bear, Old Nut and Scrap Iron were ordered from this factory after P. Lorillard acquired these brands, or were they ordered from New York?

A. Our requisitions are forwarded to our Supply Dept. for execution in New York City.

XQ. 59. Did you have anything whatever to do with getting up the package P. Lorillard Exhibit No. 16?

A. No.

XQ. 60. Did you ever hear any statement made by your business associates as to why this particular package was selected?

A. No.

XQ. 61. We have discussed a total of eight brands of tobacco; how many brands altogether do you make at this factory?

A. Eight brands—Beech Nut, Honest Scrap, Polar Bear, Bag Pipe, Pan Handle, Scrap Iron, Old Nut and Natural Leaf.

XQ. 62. You have nothing to do with the actual manufacture of tobacco, have you?

A. No.

XQ. 63. Do you know whether the formulas of Bag Pipe, Polar Bear, Old Nut and Scrap Iron or any of these was changed when P. Lorillard acquired these brands?

A. Not to my knowledge.

By MR. CAVANAGH: Question objected to as incompetent, because the witness stated that he had nothing to do with the manufacture of these brands; it is immaterial and irrelevant because it does not relate to this issue, which is on the trademark "Beech Nut" in an opposition, and furthermore it is not proper cross-examination because it is without the scope of the direct examination.

By MR. HINTON: In answer to Q. 5, Q. 8 and other questions of the direct examination the witness has testified his direct personal knowledge of the fact of manufacture, without reference to

records, and furthermore from the witness' intimate associations with this business he unquestionably has knowledge of many details of the business, besides those over which he has direct personal supervision.

XQ. 64. As a matter of fact, if there had been any change in the formulas of Bag Pipe, Old Nut, Scrap Iron and Polar Bear, at the time P. Lorillard acquired those brands, you would through your general familiarity with this business have known about it, would you not?

A. No.

XQ. 65. Have you ever heard anything during your association with this business, which has made you believe that the formulas of the four brands just referred to were changed at the time of their acquisition by P. Lorillard?

A. No.

By MR. CAVANAGH: Same objection as to XQ. 63 and it is stipulated that this objection will stand as to all similar questions along this line.

XQ. 66. In answer to XQ. 58 you said that your requisitions are forwarded to the Supply Dept. in New York, how long has this practice been carried out?

A. Ever since I have been employed here.

XQ. 67. And when P. Lorillard acquired the eight brands you have named in answer to XQ. 61, were all these brands except Beech Nut you simply continued to requisition bags as you had before; is that correct?

A. Yes.

XQ. 68. And with respect to Beech Nut, all you know about it in this connection is that when instructions were received in 1915 to make and sell or ship this tobacco, the bags similar to P. Lorillard Exhibit

No. 16 were sent from New York or on order originating in New York with which you had nothing to do; is that correct?

A. This is a peculiar question. Our requisitions are forwarded to our Supply Dept. for execution regardless of the style material, as we order only by the name and brand, specifying what kind of material.

XQ. 69. What do you mean by material?

A. So many Beech Nut bags, cartons or containers.

XQ. 70. Do you happen to remember whether your first order or lot of bags corresponding to P. Lorillard Exhibit 16 (the present Beech Nut package) were received here on a requisition for Beech Nut bags sent by you to New York, or whether the first order or shipment of these bags came to you without requisition?

A. I do not remember.

(Counsel for P. Lorillard Co. states that during the noon recess he had the witness make a search for old bags to comply with the request made in the morning by counsel for Beech Nut Co.; that after search the witness produced the Scrap Iron bag, Beech Nut Exhibit No. 2-A, and he now produces two additional bags which counsel for P. Lorillard will hand to counsel for Beech Nut Packing Co. with the statement that before resuming his deposition, just after the recess the witness showed these two additional bags to P. Lorillard's counsel, who glancing at the same casually saw that they both had printed thereon the name P. Lorillard Co., and presuming that they were merely substantial duplicates of X-Exhibit No. 2, did not consider them to be any more

than repetitions. However, in view of the subsequent cross-examination he has called the counsel of Beech Nut attention to these two bags and now hands them to him for such use as he may desire.)

By Mr. HINTON: The two bags just referred to are produced, introduced and offered in evidence as X-Exhibit No. 2-C, and Beech Nut X-Exhibit No. 2-D, Beech Nut X-Exhibit No. 2-C, bearing the name Luhrman & Wilbern Tob. Co., with a rubber stamp thereon reading "Stock owned by P. Lorillard Co."; X-Exhibit No. 2-D having the same legend printed thereon.

XQ. 71. Your attention being invited to Beech Nut X Exhibit No. 2 C, is it not a fact that this is the package in which Luhrman & Wilbern sold Scrap Iron tobacco, except that X-Exhibit No. 2-C bears a rubber stamp notice "Stock owned by P. Lorillard Co." prior to the acquisition by P. Lorillard of that stock—I mean immediately prior to that acquisition?

A. Yes, it is.

XQ. 72. Then to get this thing straight, Luhrman & Wilbern first sold Scrap Iron in a package like Beech Nut X-Exhibit No. 2-A; they next sold Scrap Iron in a package like Beech Nut X-Exhibit No. 2-B, without the rubber stamp; then Lorillard sold Scrap Iron in a package like Beech Nut X-Exhibit No. 2-C, Lorillard next sold Scrap Iron in a package like Beech Nut X-Exhibit No. 2-D, Lorillard next sold Scrap Iron in a package like Beech Nut X-Exhibit No. 2, which is the present style of package; is this correct?

A. Yes.

XQ. 73. At the beginning of your cross-examination XQ. 24 and following you testified that the package of Scrap Iron tobacco sold by Luhrman & Wilbern

was, you believed, of different coloring from that of Beech Nut X-Exhibit No. 2, the present Scrap Iron package. You were asked to look for the old labels in order to refresh your recollection during the recess, and when we convened you produced Beech Nut X-Exhibit No. 2-A, which is not colored differently from Beech Nut X-Exhibit No. 2; at the end of your cross-examination you produced Beech Nut X-Exhibit No. 2-C and 2-D which have the same coloring as Beech Nut X-Exhibit No. 2. This prompts me to ask you if in the search you made during the recess you found any old bags used for Bag Pipe, Polar Bear or Old Nut, which you did not produce when we convened?

A. During my search I found Polar Bear bags which were used by Luhrman & Wilbern Tob. Co., but did not find any Bag Pipe or Old Nut bags. The Polar Bear bags were handed to Mr. Hinton.

(No redirect examination.)

(Deposition closed.)

RALPH BOWMAN.

By MR. HINTON: Counsel for P. Lorillard is requested to furnish counsel for Beech Nut the specimens of the bags used for Honest Scrap, Natural Leaf, and Pan Handle tobaccos prior to and after the acquisition of these brands by P. Lorillard.

By MR. CAVANAGH: While not acknowledging the right of counsel for Beech Nut Co. to make this request, as all this appears to be immaterial to the present issue, counsel for P. Lorillard Co. assures counsel for Beech Nut Co. that he will be glad to oblige him in this or any similar request if it is within his power to do so.

(Adjourned subject to notice.)

IN THE UNITED STATES PATENT OFFICE.

The P. Lorillard Company, Contestant,

v.

Beech-Nut Packing Company, Contestee.

Trade-Mark Opposition No. 2805.

"Beech Nut."

NOTARY'S CERTIFICATE.

STATE OF OHIO, { ss.:
COUNTY OF BUTLER,

I, J. V. Bunnell, a Notary Public, in and for the County of Butler, State of Ohio, do hereby certify that the foregoing depositions of Herbert C. Boykin and Ralph Bowman were taken on behalf of P. Lorillard Company pursuant to agreement, and by consent, before me, at the factory of P. Lorillard Company, Middletown Branch, in Middletown, County of Butler, State of Ohio, on the 10th and 11th days of June, 1920; that the said witnesses were by me each duly sworn, before the commencement of his testimony; that the testimony of each one was written out by a typist, Miss McMahon, in my presence; that the opposing party was represented by counsel during the taking of said testimony; that said testimony was taken at Middletown, Ohio, and was commenced at 2 o'clock on the 10th day of June, 1920, and was concluded on the 11th day of June, 1920; that the deposition was read by or

Depositions of Witnesses

to each witness before the witness signed the same; that I am not connected by blood or marriage with either of said parties, or interested directly or indirectly in the matter in controversy.

In testimony whereof I have hereunto set my hand and affixed my seal of office at Middletown, County of Butler, State of Ohio, this 10th day of July, 1920.

J. V. BUNNELL,
Notary Public.

(Seal.)

IN THE UNITED STATES PATENT OFFICE.

P. Lorillard Company

v.

Beech-Nut Packing Company.

Trade-Mark Opposition No. 2805.

Beech Nut.

DEPOSITIONS OF WITNESSES.

Depositions taken on behalf of the contestant, The P. Lorillard Company, pursuant to notice, before Clarence E. Walker, a Notary Public within and for the County of Jefferson and State of Kentucky, at the office of the Franklin Printing Company, No. 416 West Main Street, Louisville, Jefferson County, Kentucky, beginning on the 15th day of June, 1920, at 10 o'clock A. M.

Present: R. B. CAVANAGH, for Meyers, Cavanagh and Hyde;

CHARLES G. MIDDLETON, for Humphrey, Crawford & Middleton, attorneys for contestant, The P. Lorillard Company;

SEBASTIAN HINTON, for Offield, Poole & Hinton, attorneys for contestee, Beech Nut Packing Company.

WADE SHELTMAN,

called on behalf of the contestant, The P. Lorillard Company, being first duly sworn, in answer to questions propounded to him by Mr. R. B. Cavanagh, deposes as follows:

Q. 1. Please state your name, age, residence and occupation.

A. My name is Wade Sheltman; I am in my sixty-second year; I reside at No. 2227 Alta Avenue, Louisville, Kentucky; I am a printer.

Q. 2. With what concern are you connected?

A. The Franklin Printing Company.

Q. 3. In what capacity?

A. I am President and Treasurer now.

Q. 4. How long have you been connected with the Franklin Printing Company, of Louisville, Kentucky?

A. I think it is twenty-eight years. The concern has been incorporated twenty-seven years. We ran a year or two before incorporating.

Q. 5. Can you state whether or not your concern, the Franklin Printing Company, of Louisville, Kentucky, ever did any printing for The Harry Weissinger Tobacco Company, of Louisville?

A. We did.

Q. 6. Can you produce any books or records in

support of or in connection with your last answer, and by this question I have particular reference to any printing in connection with the Beech Nut brand of the Harry Weissinger Tobacco Company?

A. I can. (The witness here produced a large Sales Journal).

Q. 7. What is this book?

A. This is a Sales Journal.

Q. 8. What dates or period does this Sales Journal cover?

A. Commencing June 15, 1896, and ending with October 30, 1897.

Q. 9. Is this a book of original entry?

A. It is.

Q. 10. Was it kept in the regular order of business?

A. Yes.

Q. 11. Does it form a part of the regular records of this company?

A. It is a part of the regular records of this company.

Q. 12. Will you turn to this record and read into your deposition any entries you may find therein referring to printing done for The Harry Weissinger Tobacco Company in connection with the Beech Nut brand?

A. (Reading).

April 7, 97. H. W. Tobacco Co. 10 M. Beech
Nut wrappers 7.50

7.50

June 15, 97. H. W. Tob. Co. 5000 blue
caps for
25000 Three States Mixture Slips

7.50

4.00

5000 yellow price lists	7.50	
1200 typewriter letters	2.00	
2500 Beech Nut wrappers	3.00	24.00

June 28, 97. H. W. Tob. Co. 10 M. salmon numbers	3.20	
1 pck 10 M. Beech Nut wrappers	5.00	8.20

July 9, 97. 2000 labels Fig. 4 (Beech Nut boxes)		
2000 labels Fig. 2 (Beech Nut boxes)	1.00	1.00

August 9, 97. H. W. Tob. Co.		
10 M. Beech Nut Wrappers 2 oz	5.00	5.

It is stipulated by and between counsel for the respective parties hereto that the above is a true copy of the entries appearing in the book produced by the witness; and the production of the original book in evidence is waived.

Q. 13. Please state, if you can, what "H. W. Tob. Co." means?

A. Harry Weissinger Tobacco Company.

Q. 14. Where was that concern, The Harry Weissinger Tobacco Company, located?

A. It was located in Louisville, Kentucky, on Floyd Street, between Breckinridge and Caldwell Streets.

Q. 15. Will you please look at the entries in the original book, which you have read into the record, and state in whose handwriting those entries appear?

A. The entry of April 7, 97, is in the handwriting of my sister, Miss Ethel Sheltman, who was our book-

keeper at that time. The entry of June 15, 97, looks like my handwriting. The entry of June 28, 97, looks like mine.

The entry of July 9th, 97, is my sister, Ethel's, writing.

The entry of August 9, 97, I think is my handwriting.

Q. 16. To the best of your knowledge were those goods or this printing delivered to the Harry Weising Tobacco Company?

A. Yes.

CROSS-EXAMINED BY MR. SEBASTIAN HINTON FOR THE
BEECH NUT PACKING COMPANY.

XQ. 17. According to your records the sale of these printed wrappers stopped in 1897; did it? I mean the Beech Nut wrappers such as appear in the entries above read into the record?

A. Yes, sir.

XQ. 18. What does "wrapper" mean?

A. I don't know exactly how they used it, but it was to enclose tobacco. It means just what the word expresses. If you were to go down to one of these tobacco stores you would find a package of tobacco put up in a wrapper and when the wrappers were originally printed they were flat sheets and in some way they fold them up into a package and paste the ends together and there is a tight package of tobacco. I don't know how they do it, but I know they do it.

XQ. 19. You have no personal recollection of and had no personal connection with the actual sale of Beech Nut Tobacco, did you?

A. No, sir; none at all.

(No redirect examination.)

WADE SHELTMAN.

(The further taking of these depositions was then adjourned by consent to the office of The Al Gans Tobacco Co., Sixth Street, between Main and Market Streets, Louisville, Ky.)

ALBERT P. GANS,

a witness called on behalf of The P. Lorillard Company, being first duly sworn, in answer to questions propounded to him by Mr. R. B. Cavanagh, deposes as follows:

Q. 1. Please state your name, age, residence and occupation.

A. My name is Albert P. Gans; my age is forty-eight; my residence is 119 West Oak Street, Louisville, Kentucky; my occupation, President of the Al Gans Cigar and Tobacco Company.

Q. 2. How long have you been in the tobacco business?

A. Steadily for thirty-three years.

Q. 3. With what concern were you connected?

A. The C. C. Bickel Company up until March 31, 1920, and from that time to the present, here.

Q. 4. For how long a time were you with the C. C. Bickel Company?

A. For thirty-three years.

Q. 5. In what line of business was the C. C. Bickel Company?

A. They were manufacturers of cigars and jobbers of tobacco.

Q. 6. Did you know of the concern, The Harry Weissinger Tobacco Company of Louisville?

A. I did. We bought goods from them.

Q. 7. Can you name some of the brands of goods you bought from the Harry Weissinger Tobacco Company?

A. Yes. "Hold Fast," "Burr Oak," "Weissinger Special," lots of odd brands and various smoking tobaccos. Those were the standard brands and sometimes there were brands that we bought only very little of.

Q. 8. Can you recall any other brand that you bought from them?

A. Yes; there was one called Curly Cut tobacco or thread cut called Burr Oak—no, Burr Oak was a plug—that was Beech Nut.

Q. 9. Will you please state in your own way just what you recall of this brand and what you recall of the circumstances of purchasing Beech Nut tobacco from Harry Weissinger Tobacco Company?

A. There was only one lot of Beech Nut tobacco that I remember we ever bought and that was away back there. That was about 1897, I think. It was merely a lot they wanted to introduce around town. I think they must have just started it. They sold it around town and I purchased one gross.

Q. 10. Who sold it around town?

A. Their man, David Bell.

Q. 11. What was David Bell's occupation?

A. He was a salesman for the Weissinger Tobacco Company.

Q. 12. Do you know what became of David Bell?

A. Dead. He died several years ago.

Q. 13. How do you fix this date of purchase as about 1897?

A. From personalities, you might say. I was married in 1900 and I married a young lady who was with the Weissinger Tobacco Company and this was about three years prior to that.

Q. 14. Can you describe how this thread cut tobacco was packaged?

A. My recollection is that it was a rolled package; it was a long thin cut tobacco known then as thread cut. It was not in a bag, but it was rolled with a string around it and the stamp was pasted over the string. There is some tobacco on the market now and, in fact, was then that is similar, called Five Bros.

Q. 15. I show you a package marked "Five Bros. Pipe Smoking Tobacco, John Finzer and Bros., Louisville, Ky." Is that the Five Bros. package to which you refer as being similar to Beech Nut?

A. Yes, sir.

Q. 16. I hand you herewith a piece of paper which I have marked for identification "P. Lorillard Company, Exhibit F." Do you recognize this sheet and if you do, let us know what you think about it?

A. I would say that is about the style of sheet used in rolling this tobacco. It is not a bag. They just use paper and they roll it up in a tight package as you can see here. It is very evident that this was the kind of paper they used. My recollection is that this is about the style of paper that was on that. I do not know what was the marking, but my recollection is it had a squirrel over the top. That may have been torn off—it does not show here.

Q. 17. How was that package folded—can you show me with the piece you have in your hand?

A. It would fold over so that the printing would

show on the various sides. The ends turned in this way and there was a string placed around it with a stamp covering the string and the ends so as to make it a sealed package.

Q. 18. What became of this Beech Nut special cut tobacco that you purchased from the Harry Weissinger Tobacco Company for Bickel?

A. It was sold here in town.

Q. 19. You sold it?

A. Yes, sir. There was only one little lot that we bought and that was sold here in the city. There was very little of this thread cut tobacco sold here in the city. The majority of it was sold around mining camps. It did not prove successful in the general market of Louisville.

Q. 20. Why was that?

A. It was the style of the tobacco—the thread cut. It never has been popular and is not today—there is very little of it sold locally.

Q. 21. Where is it sold?

A. Principally around the mining sections—that is where we sell it—around the Hazard and the Lynch mines. The city trade buys very little of it.

Q. 22. What is such thread cut tobacco used for?

A. Pipe smoking.

Q. 23. Do they ever chew it?

A. I doubt it. It is put up for and intended for pipe smoking.

Q. 24. Did you ever hear why Weissinger put out this Beech Nut thread cut tobacco?

A. It was said at that time it was in competition with Five Bros.

MR. HINTON: We object to this as hearsay.

CROSS-EXAMINED BY MR. SEBASTIAN HINTON FOR THE
BEECH NUT PACKING COMPANY.

XQ. 25. Do you know what happened to that old Beech Nut brand that you have been describing?

A. No, sir; I do not.

XQ. 26. Did it continue on the market?

A. I don't know.

XQ. 27. You were in the tobacco business for many years after 1896 in Louisville, were you not?

A. Yes, sir; up until the present time continuously.

XQ. 28. Did you continue to sell this old Beech Nut tobacco?

A. Of that style—no.

XQ. 29. Did you continue to sell any other style of Beech Nut tobacco?

A. Not until the—I believe it was—the Lorillard came out after that with a Beech Nut Scrap of an entirely different style.

XQ. 30. Who made this Beech Nut Scrap?

A. The one that I can recollect now is Lorillard, but there was some one prior to that, one of their factories; I don't know under what name, but Lorillard is one that I recollect of making Beech Nut Scrap.

XQ. 31. The only Beech Nut Scrap you remember is the Lorillard Beech Nut Scrap?

A. As scrap tobacco. The other was a different style. It was what was known as thread cut.

XQ. 32. How is that Lorillard Beech Nut Scrap packaged?

A. In a regular bag.

XQ. 33. Would you say that that bag was in any

way similar to this Lorillard Exhibit F about which you have testified?

A. Similar to that? No.

XQ. 34. Was there to your knowledge any connection between the Lorillard Beech Nut Scrap and the Harry Weissinger brand?

A. Nothing more than that the Weissinger Company was taken over by the American Tobacco Company which controlled the Lorillard Company.

XQ. 35. How long has this Beech Nut tobacco been off the market in this territory?

A. I did not know that it was off the market. It did not sell in the local trade.

XQ. 36. I am speaking now about your personal recollection. You have testified that this Beech Nut tobacco, Exhibit F, was sold in Louisville for your store and that subsequently there appeared a Lorillard Beech Nut Scrap.

A. Not at that time; no.

XQ. 37. How long was that interval between those two sales about which you testified?

A. I would say several years elapsed between those times.

XQ. 38. Do you know of any other brand which was previously manufactured by any other manufacturer which was taken over by Lorillard subsequently?

A. Other brands?

XQ. 39. Were there other brands previously manufactured by other manufacturers taken over by Lorillard?

A. Do you mean any specific brand; a particular style of tobacco?

XQ. 40. Yes; any name of tobacco.

A. That was taken over by Lorillard?

XQ. 41. Yes.

A. I don't know whether it was taken over by Lorillard. They were all taken over by the American Tobacco Company. They took in all the brands of Finzer Bros. and of the National Tobacco Works and of Weissinger and also the old Monarch Tobacco Company. They took over all of them. Some of them may have been continued and some of them may have been discontinued. I don't know about that.

XQ. 42. Have you a definite recollection of the packages in which various brands with which you are familiar were offered to the public? In other words, can you remember what kind of packages these old brands were offered to the public in?

A. What brand?

XQ. 43. Polar Bear.

A. Polar Bear was in a package like it is today, but possibly more weight to it.

XQ. 44. The description of the package was the same?

A. Yes; that is my recollection.

XQ. 45. How about Scrap Iron?

A. I don't know anything about that.

XQ. 46. Old Nut?

A. It does not sell and never has.

XQ. 47. How about Big Pipe?

A. That is not sold.

XQ. 48. How about Honest Scrap?

A. That is about the same style of package—a red package—red bag.

XQ. 49. In other words, the bag was not changed in its printing or description?

A. Honest Scrap has only been on this market a few years.

XQ. 50. How long?

A. Oh, I would say about five or six years.

XQ. 51. Are you familiar with Pan Handle?

A. No, sir.

XQ. 52. Natural Leaf?

A. No, sir.

XQ. 53. The Murad Cigarettes were taken over by Lorillard?

A. No, sir; I think that was a creation of Lorillards.

MR. CAVANAGH: This is objected to as not being proper cross-examination, it being beyond the scope of anything testified to on the direct examination and it is stipulated that this objection may stand to all similar questions.

MR. HINTON: It is certainly proper for counsel to test the recollection of a witness who has been called in direct to testify about a package of which there was a very small sale of tobacco in 1896 and 1897.

MR. CAVANAGH: Counsel is certainly entitled to cross-examine the witness to test his recollection on anything relating to anything to which he has testified on direct but not upon any matter which the direct examination has not shown him to be familiar with.

XQ. 54. How about Egyptian Deities?

A. I think that was also one of their original brands.

XQ. 55. Will you, for the purpose of refreshing your recollection, be kind enough to examine those

posters which are immediately behind you and look at the pictures of Murad and Egyptian Deities which are on those posters. Look at them and see if they refresh your recollection?

A. What do you want to know about them?

XQ. 56. Did you see on those posters which you have examined the name of S. Anargyros?

A. Yes, which was a part of Lorillard.

XQ. 57. Underneath that "Capital stock owned by Lorillard."

A. Yes. S. Anargyros was one of the branches of Lorillard at the time and is still run that way. They are billed under the Anargyros but the bills are paid to Lorillard. They have always kept them that way.

XQ. 58. You mean there never was any S. Anargyros?

A. Oh, yes.

XQ. 59. Independent of Lorillard?

A. Originally a number of years ago. "Deities" was one of their brands, but I think "Murad" was created afterwards. "Deities" was one of the old Anargyros brands.

XQ. 60. If "Deities" was one of the old Anargyros brands and if it was subsequently taken over by Lorillard and when it was taken over the same style of package was used by Lorillard as had been used by Anargyros with the exception of the words "Capital stock owned by Lorillard" could the difference be distinguished?

A. That would be impossible except for some one who manufactured it or handled it and was distinctly familiar with it. I am taking it in a general way as it comes to me. Some incident may bring our attention

to a particular thing and impress it on our memory when generally it may look alike and we might not take in the difference.

XQ. 61. But so far as you know it was the same package?

A. There might be a little difference in the color but generally——

XQ. 62. But generally it was the same package?

A. Yes.

XQ. 63. I show you two bags "Beech Nut Cross Exhibit No. 1 and Beech Nut Cross Exhibit No. 1a" used for Polar Bear tobacco and I call your attention to the fact that these bags are identical except that Cross Exhibit No. 1 contains at the bottom of the panel "P. Lorillard Company, Successor." That is true, is it not?

A. That is one of Luhrman & Wilbern's old brands. Now, what about this?

XQ. 64. Why do you suppose that same bag was used by the Lorillard Company when the brand was taken over from Luhrman & Wilbern?

MR. CAVANAGH: Objected to as calling for an opinion on the part of the witness who is not connected with Lorillard & Company and is not presumed to be within the scope of his knowledge.

MR. HINTON: The witness is familiar with the tobacco business.

A. There may have been various reasons for that. So far as the differences in the packages, there may be a little difference. A firm putting up scrap will sometimes get out some bags that are years back. While the general form is the same if you put the bags together you will find a difference in every one.

XQ. 65. Why do you preserve the same general form?

A. Why?

XQ. 66. Yes?

A. When you establish a thing you want to keep it before the public.

MR. CAVANAGH: That is objected to for the same reason as heretofore.

MR. HINTON: I will stipulate that that same objection will be made to all similar questions.

XQ. 67. Would you say offhand that that is the reason that these two polar bear bags are somewhat similar for the reasons you have just given—for advertising purposes?

A. I would not say because I don't know what their reasons were.

XQ. 68. But your reason, so far as you are concerned, for keeping to the same style package is that you want the customers who like the brand in question to be able to get continuously the same general style of package?

A. That is so in many instances. In other instances where there is a certain thing that does not take, we change the style of package entirely but may still use the same name. That often happens. We have done that on cigars.

XQ. 69. But in general if you want to continue the reputation and good will of any brand, you will preserve the old style of package—generally speaking?

A. Generally speaking.

XQ. 70. Can you call to mind as the result of the study you have given the subject this last few minutes any other brands taken over by P. Lorillard Company

from other manufacturers in addition to those we have mentioned?

A. I could not as to the P. Lorillard Company because it was all taken over by the American Tobacco Company and afterwards the American divided up the brands and some brand of some one manufacturer might be divided among three companies.

XQ. 71. About what time, according to your recollection, was the change made from Beech Nut Thread tobacco to Beech Nut Scrap—have you any recollection as to that?

A. I don't know anything about that.

XQ. 71. In your experience as a retail salesman, have you sold other products than tobacco—products of various kinds?

A. I would not be a tobacco salesman if I had not sold any.

XQ. 72. I mean tobacco products generally—pipes and things?

A. I don't get your question.

XQ. 73. Have you sold groceries?

A. No, sir.

XQ. 74. You have never sold anything but what would come under the head of a tobacco salesman?

A. I have not been a salesman generally. I have been more of a buyer.

XQ. 75. You did not have very much to do with selling over the counter?

A. No, sir; I was a buyer mostly.

XQ. 76. You are familiar, of course, with the present Beech Nut Scrap tobacco put out by the P. Lorillard Company?

A. Yes, sir.

XQ. 77. Can you tell me to what extent this tobacco has been advertised in this territory?

A. Very extensively.

XQ. 78. In what form?

A. In the way of signs and window displays. They had men here working. They had quite a crew here several times placing it in several forms in the different stores. It has become one of the biggest sellers in scrap tobacco here.

XQ. 79. Has there been any particular periodical advertising in the newspapers that you are familiar with?

A. I don't remember of seeing anything in the newspapers. It was on signs and window displays and posters and things of that sort.

MR. CAVANAGH: Counsel for P. Lorillard Company now introduces in evidence a package of Five Bros. tobacco produced during the examination of this witness and the Notary is asked to mark same Exhibit G.

(No re-examination.)

MR. HINTON: One more question:

XQ. 80. I notice that Exhibit G has on it "John Finzer & Brothers" and underneath "The American Tobacco Company, Successor." Can you state from your recollection whether the preceding Five Bros. Tobacco was the same general character of package but without the "The American Tobacco Company, Successor" underneath?

A. In general appearance, yes. The carton was marked different from what it is today because the original Five Bros. showed the portraits of the five Fizer Brothers and now they have five Horses Heads.

The general appearance was about the same though I think the original package was a little tighter rolled and somewhat round whereas this is more flat.

XQ. 81. I am talking mainly about the package.

A. The printed matter?

XQ. 82. No, I am talking about the package that immediately preceded this one?

A. I don't know about "immediately preceding" because the last few years there has been so much change in tobacco that I hardly think God Almighty knows what all has been.

(No re-examination.)

(Deposition closed.)

ALBERT P. GANS.

CERTIFICATE.

STATE OF KENTUCKY, }
COUNTY OF JEFFERSON, } ss.:

I, Clarence E. Walker, a Notary Public within and for the County of Jefferson and State of Kentucky, my commission as such expiring January 10, 1924, do hereby certify that the foregoing depositions of Wade Sheltman and Albert P. Gans were taken on behalf of P. Lorillard Company pursuant to agreement and by consent, before me, at Louisville, Jefferson County, Kentucky, on the 15th day of June, 1920; that each of the said witnesses was by me duly sworn before the commencement of his testimony; that the testimony of said witnesses was written out by me; that the opposing party, Beech Nut Packing Company, was represented by counsel during the taking of said testimony; that said testimony was taken at Louisville, Kentucky, and was commenced at 10 o'clock A. M. on the 15th day of June, 1920, and was concluded on the same day; that his deposition was read by each of said witnesses before the witness signed the same; that I am not connected by blood or marriage with either of said parties, nor interested directly or indirectly in the matter in controversy.

In testimony whereof, I have hereunto set my hand and affixed my seal of office at Louisville, in said County of Jefferson, State of Kentucky, this 5th day of July, 1920.

(Seal.)

CLARENCE E. WALKER,
Notary Public,
Jefferson County, Kentucky.

IN THE UNITED STATES PATENT OFFICE.

P. Lorillard Company

v.

Beech-Nut Packing Company.

Trade-Mark Opposition No. 2805.

Beech Nut.

DEPOSITIONS OF WITNESSES.

Testimony taken at Maysville, Kentucky, on behalf of P. Lorillard Company this 16th day of June, 1920, before R. B. Adair, Notary Public and acting as Examiner by consent.

Present: R. B. CAVANAGH, for P. Lorillard Company;
and

SEBASTIAN HINTON, for Beech-Nut Packing
Company.

JAMES F. SUMMERS,

a witness called on behalf of P. Lorillard Company, being first duly sworn deposes and says in answer to interrogatories propounded to him by Mr. Cavanagh as follows; formal notice of the production of this witness being waived.

DIRECT EXAMINATION.

By R. B. CAVANAGH:

Q. 1. Please state your name, age, residence and occupation?

A. James F. Summers; age 52; residence, Maysville, Kentucky; and I am engaged in the bottling business.

Q. 2. Were you ever connected with the Harry Weissinger Tobacco Company of Louisville, Kentucky?

A. I was, I went with them in the year 1884, when it was known as Weissinger & Bates, which composed the Harry Weissinger Tobacco Company. About the year 1887 or 1888 it formed the Harry Weissinger Tobacco Company.

Q. 3. How long were you with them?

A. From about along in May or June, 1884, until 1902. It was along in 1902 the Continental Tobacco Company took it over.

Q. 4. When did you come to Maysville, Kentucky?

A. In 1904, in August.

Q. 5. In what line of business was the Harry Weissinger Tobacco Company engaged?

A. Manufacture of Tobacco.

Q. 6. What position did you occupy with the Harry Weissinger Tobacco Company of Louisville, Kentucky, during your connection with them?

A. I started in as a boy knocking around the place and I worked myself up to foreman. Along in 1894 I was appointed Assistant Superintendent under Mr. Frank E. Phillips.

Q. 7. How long did you remain in that position?

A. Until January 1st, 1903.

Q. 8. What position did Mr. Frank E. Phillips occupy?

A. He was General Superintendent.

Q. 9. How long did you retain the position of Assistant Superintendent with the Harry Weissinger Tobacco Company?

A. Until it was transferred to the Continental Tobacco Company, 1903.

2
3
5
5

Q. 10. Do you know what has become of Mr. Frank E. Phillips?

A. He has been dead about six years I think; no it has not been that long, yes, it has been longer, it has been about eight years.

Q. 11. While you were Assistant Superintendent of the Harry Weissinger Tobacco Company were you familiar with the tobacco brands manufactured and marketed by them, and if so can you enumerate them?

A. In fact I had full charge of the factory when I was appointed Assistant Superintendent. I had to take charge of the whole thing on account of the bad health of Mr. Frank E. Phillips; therefore I had charge of everything in the factory. We manufactured Old Kentucky, Hold Fast, Prune Nuggett and Burr Oak. These are all the plug tobaccos. Now smoking tobaccos—Three States, Our Flag, First Cabin, Beechnut Thread Cut and Scrap, and generally we had, no we did not have any granulated.

Q. 12. Were you with Harry Weissinger Tobacco Company when the Beechnut brand of tobacco was adopted by them and if so will you state the circumstances as you recall them?

A. I was. Along in the winter, I don't remember now, 1896 or the early part of 1897, Arthur Hegan of Pittsburgh had written to the firm, I mean Harry Weissinger Tobacco Company, at Louisville, to get out a brand to compete with the Finnzer Bros., brand called Five Brothers, so I proceeded to get out a brand which at the time was made out of what is known as Green River leaf and called Beechnut.

Q. 13. Who got up the formula for this Beechnut?

A. Frank Phillips and myself, virtually I got it up.

Q. 14. Can you produce any record of, or documentary evidence showing this Beechnut formula as you got it up in the year 1897?

A. Yes, sir, I can and do. (Witness produces a book bearing on the outside the words "Harry Weissinger Tobacco Company, James F. Summers.")

Q. 15. What is that book?

A. It is a book I kept my formulas in when I was working for the Harry Weissinger Tobacco Company.

Q. 16. Will you show us the Beechnut formula in this book?

A. Yes, sir, there it is.

(Witness refers to a page in the book in which a metal tag has been inserted.)

Q. 17. When did you write that formula in that book?

A. I don't know, along about the time I got the brand up, I generally put them down after we decided to use them, I don't know exactly when it was I put it down, maybe two months after we decided to use it.

Q. 18. Did you make and put upon the market any of this Beechnut Tobacco?

A. Yes, sir.

Q. 19. When did you first put it upon the market?

A. In the winter of 1896 or early part of 1897, I am not positive which.

Q. 20. I hand you a slip of paper which has been marked for identification in this case as P. Lorillard Company Exhibit "F," and ask you if you can identify it and if so, tell us what it is?

A. That is a piece of the original package of the first Beechnut made.

Q. 21. What kind of tobacco was it?

A. Thread cut, it is a good deal like the FIVE BROTHERS BRAND put out by Finzer Bros., of Louisville, Ky.

Q. 22. Is this a type of Finzer Bros. tobacco to which you refer?

(Shows package to witness.)

A. Yes, sir.

Q. 23. I now show you P. Lorillard Company Exhibit "G." and ask you if that is the Five Bros. package to which you have referred?

A. Yes, sir; this is not the weight, it was about two ounces, and this is 1 7/8, they made about two ounce packages.

By MR. CAVANAGH: The piece of paper offered in evidence as Exhibit "F." is a brown strip of paper with the words "Beechnut" thereon and is now offered in evidence and marked P. Lorillard Exhibit "F."

Q. 24. Do you know where this exhibit "F." came from?

A. Well, yes; we used that package in the latter part of 1896 or 1897, then after we changed the brand to scrap, we used that paper to mark down things on to keep our memory fresh.

Q. 25. Has this paper been in your possession?

A. It has been in my possession ever since 1903, February 16th.

Q. 26. About what year did the Harry Weissinger Tobacco Company change over the Beechnut brand from thread cut to scrap tobacco?

A. Along about 1897. They did not make that thread cut long; they never made much of it at all. I guess they made it about three or four months. I can tell you one reason why they did not make it long be-

cause Finzer, Five Bros., was a union brand and Beechnut thread cut was not, and they could not sell it, and that is the reason they changed it to scrap tobacco. They could not sell it among the mining districts.

Q. 27. How do you fix the latter part of 1896 or the early part of 1897 as the date when the Harry Weissinger Tobacco Company began to put out Beechnut brand of tobacco?

A. The only way is anything I know I have got in my mind, and I can keep it.

Q. 28. What I am asking you is there any circumstance that would enable you to fix 1896 or 1897 as the date when the Harry Weissinger Tobacco Company first put out the Beechnut brand?

A. Well, it was along about the time that Finzer Brothers sold out to the Continental Tobacco Company. I think they sold out about the middle of 1898.

Q. 29. How long before Finzer Brothers sold out to the Continental Tobacco Company did Harry Weissinger Tobacco Company put out Beechnut brand of tobacco?

A. A little over a year.

Q. 30. Did Harry Weissinger Tobacco Company to your personal knowledge sell Beechnut Thread Cut tobacco?

A. They did; yes, sir.

Q. 31. Was it wrapped in wrappers like this? (Shows witness Exhibit "F.")

A. It was.

Q. 32. I hand you herewith a package which is in this case as P. Lorillard Company Exhibit (14), and ask you if you can identify such a package and tell us what you know about it?

A. This is a Beechnut package that we used to put up the original scrap in.

Q. 33. Who?

A. Harry Weissinger Tobacco Company.

Q. 34. When?

A. I suppose we put that out in 1897; I know we did.

Q. 35. For what period of time did you put that out?

A. They put it out until they sold out to the Continental Tobacco Company, along in 1903. Everything pertaining to Beechnut was shipped away from Louisville, and if I am not mistaken it was shipped to Middletown, Ohio. Some things were shipped to different parts of the country, but I think everything pertaining to Beechnut was shipped to Middletown, Ohio. I am positive about that.

Q. 36. Can you state whether the Harry Weissinger Tobacco Co. sold tobacco like this? (Attorney shows package of tobacco, Lorillard Exhibit 14, to witness).

A. Yes, sir; they did.

Q. 37. Where did they sell such tobacco?

A. A good deal in Louisville; in fact, over a good part of the United States; some of it in Pennsylvania; they chewed and smoked it both in Pennsylvania.

By MR. CAVANAGH: The formula book, produced by the witness is now offered in evidence, and the Notary is requested to mark the same for P. Lorillard Company Exhibit "H."

Q. 38. I hand you herewith a slip of paper upon the back of which is stamped the date, January 12th 1903, and I merely mention this to identify the paper,

and ask you if you can tell me whose handwriting appears on that slip in pencil, and what it means?

A. The handwriting is that of Harry Weissinger, and was handed to me to instruct me how to pack Beechnut that was left on hand at that time, January 12th-1903.

By MR. CAVANAGH: This slip of paper is offered in evidence and the Notary is requested to mark same for identification P. Lorillard Company, Exhibit "I."

Q. 39. I hand you herewith two letters written on the letter paper heads of Harry Weissinger Tobacco Company, one dated February 6th-1903, and the other December 11th-1903, and ask you if you can tell me what these are?

A. These are copies of letters sent me from the Continental Tobacco Company, New York, notifying the Harry Weissinger Tobacco Company what disposition to make of things that were there in the Harry Weissinger Tobacco Company at Louisville, Kentucky. One, the other is from Mr. R. K. Smith notifying us what to do with different things. R. K. Smith had charge of the leaf department of the Continental Tobacco Company, Louisville, Kentucky. They were copies handed to me because I had charge of attending to all such work.

By MR. CAVANAGH: The two letters (copies) are pinned together to form one exhibit, and are offered in evidence and the Notary is requested to mark the same P. Lorillard Company Exhibit "J."

Q. 40. I hand you herewith a slip of paper having typewritten thereon, the heading "Harry Weissinger

Tobacco Company Marked Boxes, and ask you to tell us, if you know, what this is, and what you know about it, giving dates.

A. This is a record of all boxes used in what was known as the Harry Weissinger Tobacco Company in the smoking department. This is a list of the size of the boxes given to me by Mr. Jarboe of the C. C. Mengel Box Company, Louisville, Kentucky. It might have been given to me in 1893, of course, they would add to it as we would have different size boxes made.

Q. 41. Are there any additions on that there?

A. Yes, sir; a good many.

Q. 42. How are the additions noted?

A. Beechnut in three different shapes and size boxes.

Q. 43. Why do the additions appear in pencil and the other in typewriting?

A. The reason this was done was in case boxes would come to the factory and upon examination they were found not to be up to the standard, I would have redress against the Box Company, and from then on as I would put in orders for different size boxes I would enter it with a led pencil, or the party that ordered them.

By MR. CAVANAGH: The marked "Box" list produced by witness, I now offer in evidence and the Notary is requested to make the same P. Lorillard Company Exhibit "K."

Q. 44. Did you personally, while with the Harry Weissinger Tobacco Company, supervise the preparation of Beechnut tobacco?

A. I did, for several years, from the time it was gotten up until it was disposed of to the Continental Tobacco Company, from 1897 to 1903.

Q. 45. Can you state of your own personal knowledge whether or not this Beechnut tobacco was continuously sold during this period that you have just stated?

A. It was.

Q. 46. How do you know?

A. I manufactured it; I put it out; I was with it day in and day out, years in and years out, and I had supervision of the manufacture of it.

Q. 47. Can you state whether or not you know it was sold from the factory?

A. Yes, sir; I have seen it go out in loads; I have seen it on the market in Louisville, and I have seen it on the market in Madison, Indiana, because I bought a package there myself.

Q. 48. About when was that?

A. I could not tell you that; it was in the summer time; I was there on a boat excursion.

Q. 49. How many years ago?

A. Around twenty-four or twenty-five years ago. They used to have a customer there that handled a good deal of that; I. Nicklows was the name of the man that handled it there.

Q. 50. I hand you herewith a book and ask you if you can identify it and if so, tell us what it is?

A. Yes, sir; it is Connorton's Tobacco Brand Directory of the United States, 1903. The manufacturers of tobacco whenever they would adopt a name for a brand of tobacco they would have it registered in said directory.

Q. 51. Do you recall how often this book was issued?

A. One every year.

Q. 52. About what time of the year?

A. They would generally get it out about the middle of January, if I am not mistaken; no, they usually got it out about the first of January.

Q. 54. This was the last one that was sent to the Harry Weissinger Tobacco Company?

A. Yes, sir, I guess it was; it was the last one I saw.

Q. 55. Mr. Summers, will you look in that book and tell us whether or not you can find Beechnut Tobacco Brand registered therein?

A. Yes, sir; on page 328, of Connorton's Tobacco Directory, 1903, you will find registered Beechnut (Scrap), Harry Weissinger Tobacco Company, Louisville, Kentucky.

Q. 56. Did you ever know a man by the name of Dave Bell?

A. Yes, sir; he was City Salesman for the Harry Weissinger Tobacco Company in Louisville, and also traveled in other parts of Kentucky.

Q. 57. Now, Mr. Summers, you have produced here and offered in evidence certain documentary matters, such as P. Lorillard Company, Exhibit F, G, H, I, J and K, and you have also referred to the old Connorton's Tobacco Brand Directory, will you just tell us in your own words how long you have had these documents in your possession and how you happened to come to have them in your possession for the length of time that you have had them?

A. Well, along in the fall of 1902, in December, we began to dispose of everything that was sold to the Continental Tobacco Company by the Harry Weissinger Tobacco Company. We had their letters mailed to the Harry Weissinger Tobacco Company notifying them what disposition to make of things at the Weis-

singer factory. There was a copy given to me, some bearing the name of Frank E. Phillips and some Jas. F. Summers. After disposing of said things enumerated I filed all of these copies and kept them. Some time I wanted to see them or something might come up about the disposition of said things, and I would have them in evidence for my personal protection. After the deal was closed out, these papers being filed by me and in the office I took the whole bunch and put them in my trunk, and when I moved to Maysville in 1904, I brought the papers along with me. I have a lot more of them which are still up home with other things. I had a lot of papers damaged during the flood of 1913, here in Maysville, Kentucky, and I threw them away. I never thought I would have any use for them as I had them for about ten years.

Q. 58. Now to your personal knowledge the Harry Weissinger Tobacco was making and selling Beechnut Tobacco along in the last part of the year 1896 or the spring of 1897?

A. Yes, sir.

Q. 59. How long did the Harry Weissinger Tobacco Company continue to so make and sell this Beechnut tobacco?

A. Until it was disposed of to the Continental Tobacco Company.

Q. 60. Until what was disposed of to the Continental Tobacco Company?

A. Until the Harry Weissinger Tobacco Company was disposed of and sold to the Continental Tobacco Company.

(Mr. Cavanagh announced that the direct examination of the witness was closed.)

CROSS-EXAMINATION.

By SEBASTIAN HINTON :

XQ. 1. What happened to the Old Kentucky Brand, Mr. Summers?

A. I think that was sent to 18th and Broadway, Continental Tobacco Company, Louisville, Kentucky.

XQ. 2. What happened to the Three States tobacco brand?

A. That was sent to 18th and Broadway, the Continental Tobacco Company, Louisville, Kentucky.

XQ. 3. How long did they continue on the market, do you know?

A. I could not tell you, I was not with them.

XQ. 4. What happened to the Hold Fast Brand?

A. That went to 18th and Broadway, Continental Tobacco Company, Louisville, Kentucky.

XQ. 5. What happened to Prune Nugget Brand?

A. They sent that to 18th and Broadway, Continental Tobacco Company, Louisville, Kentucky.

XQ. 6. When did you cease your connection with the tobacco business?

A. Along about the 31st day of July, 1904.

XQ. 7. That was after the transfer to the Continental Tobacco Company of the Beechnut brand?

A. Yes, sir.

XQ. 8. That was in Louisville, Kentucky?

A. Yes, sir.

XQ. 9. What sort of reputation did the Harry Weissinger Tobacco Company have amongst its trade?

A. It had the reputation of putting out as good tobacco as was in the United States.

XQ. 10. The name Harry Weissinger Tobacco Company on a package of tobacco was an indication of good quality?

A. Yes, sir.

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XQ. 11. I show you a Beechnut package of tobacco which I believe is in evidence as P. Lorillard Company Exhibit No. 17, which bears the name Harry Weissinger Tobacco Company, and underneath that Luhrman & Wilbern Tobacco Co., successors, that pack is the same with the exception of that addition, as your old Beechnut, is it not?

A. Yes, sir, with that exception.

XQ. 12. From your knowledge of the tobacco industry why was it that this same sort of tobacco was preserved by them?

A. Because of the trade they had on the market.

XQ. 13. Now, Mr. Summers, you have testified about this directory as issued in 1903, and which has not been introduced into evidence. You testified here that the Harry Weissinger Tobacco Company registered Beechnut Brand in this book?

A. Yes, sir.

XQ. 14. The book shows that fact?

A. Yes, sir.

XQ. 15. Aside from the book have you any definite recollection of having received a certificate of registration for Beechnut brand?

A. Being connected with the factory and not with the office force such things as these were kept locked up in the safe in the office.

XQ. 15. On page 328 of this directory there appears this entry, Beechnut Brand (Scrap) Harry Weissinger Tobacco Company, Louisville, Kentucky. Does this mean that Harry Weissinger Tobacco Company was the manufacturer?

A. Yes, sir.

XQ. 16. How old is this directory?

A. Published in 1903.

XQ. 17. Is this the last one you have seen?

A. Yes, sir, the Harry Weissinger Tobacco Company had gone out of business and this is the last one they received.

XQ. 18. I notice underneath Beechnut Scrap are three brands upon page 328 located by a star, and this star appears frequently in other places on this and other pages throughout the book, and I notice also in the introduction on page five of the book the following notice: "*Our records are now the most complete in the United States, and we can give very valuable information in relation to Brands. We have in our possession the name (unpublished) of about (15000) fifteen thousand brands of tobacco that have become obsolete by virtue of abandonment, disuse, or firms retiring from business. When application is made for registration, be sure and specify as to class of tobacco on which brand is to be used. A star (*) is prefixed to all brands registered with us, which signifies incontestible ownership; and if any such brand are infringed upon, we notify the rightful owner immediately upon our receiving the information.*" Now as I read that paragraph it seems to mean to me that if the brand is properly or formerly registered with Connorton's directory which is prefixed in the book preceded by a star, indicates that it has been so registered, is that what it means to you?

A. No, sir, it is not. There were two fees for registration, one fee was merely for registering the brand, then an additional fee for guaranteeing that no one else was using said name, then this was preceded by a star which guaranteed it to be incontestible. To the best of my knowledge the fee for merely registering the brand was \$2.00 and the fee for guaranteeing there was no other brand by that name being used was \$10.00. How I know this after taking charge of The

Green River Tobacco Company at Maysville, Kentucky, I got up two or three brands and had them registered and that was the fees charged as I remember.

XQ. 19. They charged you one fee for registering and one fee for guaranteeing there was no other person using that brand?

A. Yes, sir.

XQ. 20. They say here where we search the records and no registration results we charge fifty cents each, what does that mean?

A. The way I take that is this, you see for instance you write them asking if there is a brand under a name you have selected, and they search the records and write you in regard to it and charge you fifty cents for looking through the book for the name.

Mr. Hinton asks that page five be copied in this deposition, and is as follows:

"Since January 1st, 1895, we have had a bureau of registration and information in connection with our directory. To such as so desire we issue certificates of registration charging therefor the nominal price of \$1.00 each, payable upon application. When we search our records and no registration results, we charge fifty cents each. It would be well for manufacturers and jobbers before adopting any new brand, to consult us, asking us if the brand is in existence.

"Our records are now the most complete in the United States, and we can give very valuable information in relation to Brands. We have in our possession the names (unpublished) of about Fifteen Thousand (15,000) brands of tobacco that have become obsolete, by virtue of abandonment, disuse, or firms retiring from business. When application is made for registration, be sure and specify as to class, of tobacco on which brand is to be used. A star (*) is prefixed to all brands

registered with us, which signifies incontestible ownership; and if any such brand are infringed upon, we notify the rightful owner immediately upon our receiving the information."

That reads as if they issue a certificate of registration for \$1.00, and if they search their records and find they could not register they charged fifty cents and down farther they state that a star is prefixed to the brand registered by them, I gather from that if they find that any person had the exclusive right in their opinion to use the name they would issue a certificate of registration for \$1.00 and put a star in front of it, and if they found that several people were using the same name, they would carry the name in the book for the benefit of other manufacturers, and would not put a star in front of it, as for instance I find on page 80 five Gold Leaf brands made by different manufacturers and three Gold Medal brands by different manufacturers, whereas every place the star appears there seems to be only one brand by that name, is that the result of your investigation?

By MR. CAVANAGH: All this line of cross-examination is objected to on the ground that the witness has not testified that he was familiar with the manner and methods of the publication of Connorton's Tobacco Directory, and this is not within the scope of his direct examination.

By MR. HINTON: The witness has testified on direct examination that the brand Beechnut was registered in this book, and I simply want to find out whether or not registration means what it appears to mean from the prefix of the book or whether in fact it means something else and is misleading.

(By the witness, Mr. Summers.)

A. The star indicated ownership, proven and incontestible.

XQ. 21. Now I notice on page seventeen, Connor-ton's Directory brand Beechnut Walsh, Boyle & Com-pany, Chicago, Illinois, what does that mean?

A. It means that Walsh, Boyle & Company of Chi-cago, Illinois, is putting up a plug or twist under the name of Beechnut, it is just the same as if you would put out a hat and call it a name and I would put out a piece of tobacco and call it the same name, we could both use that name.

XQ. 22. You tell us that from your experience in the tobacco business?

A. Yes, sir.

XQ. 23. Then speaking from your experience in the tobacco business would you say that plug and twist would not be the same as scrap tobacco?

A. No, sir.

XQ. 24. Entirely different class of goods?

A. Yes; sir.

By MR. CAVANAGH: The question is objected to as it is a matter dealing with a judicial ques-tion and the witness is not competent or qualified to answer.

XQ. 25. Did you ever see this Beechnut tobacco put out by this Chicago firm?

A. No, sir, I did not.

XQ. 26. You don't know anything about the style of package in which it was put out?

A. No, sir.

XQ. 27. How long were you in the tobacco busi-ness?

A. 1884 to 1906.

XQ. 28. Do you know in what states Beechnut de-

scribed as P. Lorillard Exhibit No. 14 was sold by the Harry Weissinger Tobacco Co.?

A. Most all over the country.

XQ. 29. Did you ever have any dealings with Con-norton's Directory?

A. Only after I came to Maysville in 1905.

XQ. 29a. Were you in the tobacco business then?

A. Yes, sir.

XQ. 29b. Where?

A. Here in Maysville.

XQ. 30. Who were you with?

A. Green River Tobacco Company.

XQ. 31. And you registered certain brands for the Green River Tobacco Co.?

A. Yes, sir, Kentucky Colonel and Proper Thing.

XQ. 29. You did not get a certificate of ownership, proven and incontestible?

A. No, sir.

XQ. 30. You just registered the brand and the fee was \$2.00?

A. Yes, sir, to the best of my knowledge, that was the fee.

XQ. 31. That is your best recollection?

A. Yes, sir.

RE-DIRECT EXAMINATION.

By MR. CAVANAGH:

RDQ. 1. What is plug tobacco used for?

A. Some for chewing and some for smoking.

RDQ. 2. What is scrap tobacco used for?

A. For chewing and smoking.

RDQ. 3. Both of them are tobacco products are they not?

A. Yes, sir, they are both tobacco.

RDQ. 4. I call your attention to the Beechnut registered by Walsh, Boyle & Company, Chicago, Illinois, appearing on page seventeen of Connorton's Directory for 1903, and ask you if you can find any star in front of that brand?

A. No, sir, I do not.

By MR. CAVANAGH: Connorton's Directory for 1903 produced by the witness is offered in evidence and the Notary is requested to mark the same P. Lorillard Company Exhibit "L."

(Re-Direct Examination closed.)

RE-CROSS-EXAMINATION.

By MR. HINTON:

RXQ. 1. What is indicated to you by the fact that neither of the two Beechnut brands appearing in 1903 Connorton's Directory in connection with two different manufacturers has no star in front of them?

A. It shows that they have merely been registered and no fee has been paid for a guarantee.

RXQ. 2. Do you mean that every name appearing in that would be there because some one had paid one dollar?

A. Well it had to be paid or it would not have been registered.

RXQ. 3. The book does not contain a complete list of all brands upon the market.

A. I don't know, I cannot say as to that.

RXQ. 4. Would you say that was a complete list?

A. I don't know, things like that never bothered me.

RXQ. 5. Is that what it was supposed to be among manufacturers?

A. Yes, sir.

RXQ. 6. You don't believe, do you, that there was \$1.00 paid for every brand of tobacco in the United States?

A. I don't know, I could not say as to that.

RXQ. 7. Don't you believe that every name that appears in that Directory was put there because the manufacturer paid \$1.00 for that purpose?

A. Yes, sir, I think that.

RXQ. 8. As a matter of fact coming down to it, have you concluded as a result of your thought within the last five minutes, that Connorton's Directory published all the brands that were on the market, and they put a star in front if they searched that brand in the directory at the request of the manufacturer and found no conflict in the name they issued a certificate.

A. It may have been that way, I won't say.

By MR. CAVANAGH: All this line of examination is objected to because the book speaks for itself, and the book also has a key, and is not within the scope of his direct examination.

By MR. HINTON: The witness testified on direct examination as to this book and what it means.

J. F. SUMMERS.

It is hereby stipulated by and between counsel that the exhibits in this case may be retained in the custody of the respective counsel until final hearing, subject to call for inspection by the parties, and each party agrees to furnish the other with copies of such of the exhibits of which it may be possible to make ordinary copies.

NOTARY'S CERTIFICATE.

STATE OF KENTUCKY, }
COUNTY OF MASON, } ss.:

I, R. B. Adair, a Notary Public within and for the County of Mason and State of Kentucky, do hereby certify that the foregoing deposition of James F. Summers was taken on behalf of P. Lorillard Company, pursuant to agreement, and by consent, before me, at my office in Maysville, Mason County, Kentucky, on the 16th day of June, 1920; that the said witness was by me duly sworn before the commencement of his testimony; that the testimony of said witness was written out by me; that the opposing party, Beech-Nut Packing Company, was represented by counsel during the taking of said testimony; that said testimony was taken at my office, Maysville, Mason County, Kentucky, and was commenced at 10 o'clock A. M., on the 16th day of June, 1920, and was concluded on the same day; that the deposition was read by said witness before the witness signed the same; that I am not connected by blood or marriage with either of said parties, nor interested directly or indirectly in the matter in controversy.

In testimony whereof I have hereunto set my hand and affixed my seal of office at Maysville, in said County of Mason, State of Kentucky, this 16th day of June, 1920.

(Seal.)

R. B. ADAIR,
Notary Public.

My commission expires January 12, 1922.

IN THE UNITED STATES PATENT OFFICE.

P. Lorillard Company

v.

Beech-Nut Packing Company.

Trade-Mark Opposition No. 2805.

Beech Nut.

NOTICE.

New York, N. Y., February 4th, 1921.

Messrs. Offield, Poole & Hinton,
38 South Dearborn Street,
Chicago, Ill.

Please take notice that on Wednesday, February 9th, 1921, we shall proceed to take testimony in rebuttal in the above-entitled cause, pursuant to the Rules and Statutes in such cases made and provided, at the office of Meyers, Cavanagh & Hyde, 200 Fifth Avenue, New York City, beginning at 11 o'clock A. M.

The following witness will be examined:

JACOB LEVY, 22, 4th Avenue, New York City, and perhaps others.

You are invited to attend and cross-examine.

MEYERS, CAVANAGH & HYDE,
Attorneys for P. Lorillard Co.

Due and timely service acknowledged this 8th day of February, 1921.

OFFIELD, POOLE & HINTON,
Attorneys for Beech-Nut Packing Co.

IN THE UNITED STATES PATENT OFFICE.

P. Lorillard Company

v.

Beech-Nut Packing Company.

Trade-Mark Opposition No. 2805.
Beech Nut.

REBUTTAL TESTIMONY.

Rebuttal testimony taken on behalf of P. Lorillard Company, before A. F. Breslin, and pursuant to notice, at New York City, beginning this 9th day of February, 1921.

Present: R. B. CAVANAGH, Esq., counsel for P. Lorillard Company;

SEBASTIAN HINTON, Esq., counsel for Beech-Nut Packing Company.

By agreement between counsel the taking of the rebuttal testimony of Jacob Levy, a witness for the P. Lorillard Company is hereby adjourned until tomorrow, February 10th, 1921, and it is further agreed that the testimony of said witness Levy may be taken at the offices of the Metropolitan Tobacco Company, 22 Fourth Avenue, New York City, instead of at the offices of Meyers, Cavanagh & Hyde, 200 Fifth Avenue, New York City, as named in the notice.

Thursday, February 10th, 1921.

Met pursuant to adjournment, at the offices of the Metropolitan Tobacco Company, 22 Fourth Avenue, New York City.

Parties present as before.

JACOB LEVY,

witness called on behalf of the P. Lorillard Company, in rebuttal, being first duly sworn, deposes and says in answer to interrogatories propounded to him by Mr. Cavanagh, as follows:

Q. 1. Please state your name, residence and occupation?

A. Jacob Levy, 22 Fourth Avenue, N. Y., purchasing agent for the Metropolitan Tobacco Company.

Q. 2. How long have you been connected with the Metropolitan Tobacco Company?

A. Since November, 1893.

Q. 3. Has the Metropolitan Tobacco Company any connection with the New Jersey Tobacco Company?

A. Yes, sir.

Q. 4. What is the connection?

A. Well, it has a controlling interest in the stock of the New Jersey Company.

Q. 5. During the taking of testimony on behalf of the Beech-Nut Packing Company in this Opposition, and at the conclusion of the deposition of one Guy W. Sharpe, there was placed and read into the record of the case an invoice from The American Tobacco Company dated July 12th, 1919, Order No. 19,122, showing certain shipments of "Beech Nut" cigarettes from the Kinney-Duke Branch on behalf of the Beech-Nut

Packing Company, and which invoice reads in essential parts as follows:

"Entered 7/11,		Order of 7/11.		
		Gro.	Price.	Total.
2060 Beech-Nut				
Cigarettes 10s	2060	5.75M		11.85
				Net cash.

Shipped to the following:

B. Arkell, Equitable Bldg.,
120 Broadway, New York.

James R. Offield,
1223 Monadnock Bldg.,
Chicago, Ill.

New Jersey Tobacco Co.,
Jersey City Branch,
Jersey City, N. J.

Do you know anything of the result or anything in connection with the said shipment of Beech-Nut cigarettes by the Beech-Nut Packing Company to the New Jersey Tobacco Company?

A. Yes, sir.

Q. 6. Will you please state in your own language just what you know about this matter?

A. Without our knowledge a shipment of Beech-Nut Company's cigarettes was shipped to the Jersey City Branch of the New Jersey Tobacco Company, and Mr. Adolph Tonn, the manager of that branch, on receiving this shipment, 'phoned to ask me what it was about or what it was for. I informed him not to use any of these cigarettes as we would not put them out on the market, as this brand was being manufactured by the P. Lorillard Company, and I personally saw the

cigarettes at their office, that is the Beech Nut cigarettes of the Lorillard Company. I 'phoned him to hold them, and I would give him shipping instructions in a day or so.

Q. 7. What did you do then?

A. I had the matter up with Mr. Arkell (I think that's the man's name) of the Beech-Nut Packing Company, downtown, and furthermore, I wrote Mr. Arkell of this Company, but I cannot find a copy of the letter, and we received word from them to ship them the cigarettes, which we did, to their New York Office.

Q. 8. So as I understand it, you did not place these cigarettes upon the market, but you returned them to the Beech-Nut Packing Company?

A. Yes, sir.

Q. 9. To the New York Office?

A. Yes, we did not sell one package of these cigarettes; the reason for not doing so was because I personally saw at Lorillard's their Beech Nut cigarettes some time before this brand was shipped to us by the Beech-Nut Company. The goods we received from the Beech-Nut Packing Company was a plain ordinary cardboard package with ten cigarettes, with the name Beech-Nut printed on the front of the box. It was a plain white box with the name printed on.

Q. 10. You say you never sold a package of these Beech-Nut Company's cigarettes?

A. Never sold one package of these 10 cigarettes.

Q. 11. As I understand from your testimony, you did not order the Beech-Nut cigarettes of the Beech-Nut Packing Company?

A. Correct, sir.

(Direct examination closed.)

CROSS-EXAMINATION.

By MR. HINTON :

The deposition of this witness is objected to as not the best evidence, consisting largely of hearsay.

XQ. 1. Without waiver of objection. Is the New Jersey Tobacco Company a branch of the Metropolitan Tobacco Company?

A. No, sir, a separate corporation. The New Jersey Tobacco Company is a New Jersey Corporation; the Metropolitan Tobacco Company is a New York Corporation.

XQ. 2. Does the New Jersey Tobacco Company buy things on its own account?

A. No, sir. All requisitions, no matter for what it is, must first come through here—through the New Jersey's office which is situated here at 22 Fourth Avenue.

XQ. 3. You are the purchasing agent?

A. Yes, sir.

XQ. 4. Have you made any examination of your records, to show, or to satisfy yourself that no order was ever placed with the Beech-Nut Packing Company for these cigarettes?

A. Yes, sir. And furthermore, Mr. W. H. O'Brien of The American Tobacco Company informed me before shipping these cigarettes, as follows: That he was sending us some cigarettes which he would like to have disposed of as a Trade-Mark brand, and when I received these cigarettes and opened the package and found that the name was "Beech-Nut," I 'phoned him and told him that we could not put this brand on the market as I saw the "Beech Nut" package of cigarettes manufactured by the P. Lorillard Company on Mr. Belt's desk quite some time ago, and I did not

want to get into any trouble with any of the manufacturers, and I was going to take it up with the Beech-Nut people who sent us an invoice for these cigarettes, to relieve us of same, as we would not put them out, and he informed me that it would be all right, and that he would see that it was taken care of.

XQ. 5. Do I understand your testimony that these cigarettes were sent to you on instructions of somebody connected with The American Tobacco Company?

A. Yes, sir, at that time Mr. O'Brien was Vice-President. He is out of there now.

XQ. 6. And how he got them, where he got them, or what happened in that connection you do not know?

A. Who got them? Mr. O'Brien told me he was having some cigarettes sent here which came from the Beech-Nut Packing Company.

XQ. 7. And your reason for not putting them out was that you did not want to get in trouble or difficulty, of any kind with P. Lorillard Company?

A. I didn't want to have any trouble because I had seen the brand at P. Lorillard Company's, and Mr. Belt told me he was going to put this cigarette brand on the market, and I know that P. Lorillard Company also had a brand called "Beech Nut Scrap," which was on the market for some time.

XQ. 8. Now where did you see that Lorillard brand of "Beech-Nut" cigarettes?

A. At the P. Lorillard Company, 119 West 40th Street.

XQ. 9. Did you see some packages of cigarettes, or just the envelope?

A. Full packages of cigarettes, sir.

XQ. 10. Where were they?

A. On Mr. Belt's desk at 119 West 40th Street, and he showed me them.

XQ. 11. What is Mr. Belt? Is he an officer of P. Lorillard Company?

A. He is Vice-President of the company.

XQ. 12. I show you an empty foil package of "Beech-Nut" cigarettes. Does that correspond to the package you saw on Mr. Belt's desk?

A. Yes, sir.

(The empty package just referred to is introduced in evidence as "Beech Nut" Cross-Exhibit Lorillard Cigarette Wrapper.)

(A Patent Office copy of Beech Nut Packing Company's registration No. 89,613, of December 31st, 1912, is offered in evidence as "Beech-Nut" Cross-Exhibit Trade-Mark Registration, and it is stipulated that this may have all the force and effect of the original.)

XQ. 13. Now as I understand it, P. Lorillard Company is one of the four big Tobacco Companies, is it not?

A. Yes, sir.

XQ. 14. P. Lorillard Company has from time to time taken over a lot of brands, has it not, of other manufacturers?

A. Oh, I don't know about that, you see——

Objection by MR. CAVANAGH: That question is objected to as immaterial and irrelevant, and furthermore, the witness has not been shown as competent to pass upon P. Lorillard's business in this respect, and furthermore, the question is objected to as beyond the scope of the examination, which was directed simply to the sending of Beech-Nut cigarettes by the Beech-Nut Packing Company to the New Jersey Tobacco Company.

XQ. 15. You buy the Lorillard stuff, don't you?

A. Yes, sir.

XQ. 16. The Anargyros brand is now handled by the Lorillard Company?

A. Yes, sir.

XQ. 17. And a considerable number of other brands that used to be put out by other manufacturers?

A. No, sir. The Anargyros was turned over, as far as I read in the papers, at the time of the disintegration of the American Tobacco Company.

XQ. 18. Lorillard puts out Murads?

A. Yes, sir.

XQ. 19. You remember what the appearance of the retail package was of the various Anargyros brands that were made before those brands were taken up by Lorillard Company.

A. Yes.

By MR. CAVANAGH: This question objected to as immaterial and irrelevant.

XQ. 20. The general appearance of these packages remains the same now, doesn't it?

A. Yes, the coloring may have been changed.

XQ. 21. Would you, as an expert in the tobacco line, would you say that the Lorillard Company maintained the same general appearance?

Objection by MR. CAVANAGH: While perfectly willing to give Counsel for the Beech-Nut Packing Company all latitude in proper cross-examination, objection is made to this line of first attempting to qualify this witness as an expert, when he was simply called upon to testify to the fact of the alleged sale of Beech-Nut cigarettes by the Beech-Nut Packing Company, and no good reason is seen why an attempt should be made to delve into all of the entire tobacco business of the Lorillard Company and other concerns.

By MR. HINTON: Witness has testified on direct examination without the production of records to various happenings and interrelationships between various tobacco concerns. It is perfectly competent in order to test the reliability of the witness' recollection, to ask him a few general questions concerning the handling of various brands.

(It is stipulated that Mr. Cavanagh's objection may relate to all this line of examination without repetition.)

XQ. 22. As an expert in this line, why do you suppose the Lorillard Company kept the appearance of these packages the same?

A. Why they kept them? Because that was the original brand they put out and they kept the same package.

XQ. 23. In other words, would they take over for instance an Anargyros brand and continue to market that brand and keep the same general appearance?

A. Yes, sir, except the color or lithographing may have been changed.

XQ. 24. The reason for this, of course, was that if these cigarettes or whatever the product was, had a certain good will attached to them, they wanted to get the benefit of that good will.

A. I simply believe they kept the package the same way to show that they were getting the regular brand of cigarettes.

XQ. 25. That's ordinary common sense, isn't it?

A. Yes, sir.

(No redirect examination.)

(Deposition closed.)

JACOB LEVY.

STIPULATION.

With relation to the invoice from The American Tobacco Company dated July 12th, 1919, Order No. 19,122, referred to in the rebuttal deposition of the witness, Levy, and copied into the record immediately following the deposition of Guy W. Sharpe, a witness for the Beech-Nut Packing Company, it is hereby stipulated that the B. Arkell, Equitable Building, 120 Broadway, New York City, named in said invoice, is the President of the Applicant, the Beech-Nut Packing Company, and that the James R. Offield, 1223 Monadnock Building, Chicago, Ill., also named in said invoice, is Attorney for the Applicant, the said Beech-Nut Packing Company. Adjourned subject to notice.

IN THE UNITED STATES PATENT OFFICE.

P. Lorillard Company

v.

Beech-Nut Packing Company.

Trade-Mark Opposition No. 2805.

Beech Nut.

CERTIFICATE.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

I, A. F. Breslin, a Notary Public in and for the County of New York, State of New York, do hereby certify that the foregoing deposition of Jacob Levy

was taken in rebuttal on behalf of the P. Lorillard Company, pursuant to agreement and notice, before me, at New York, County of New York, State of New, on the 10th day of February, 1921; that the said witness Jacob Levy was by me duly sworn; that the testimony of said witness was taken by me in shorthand, and thereafter reduced by me to typewriting; that the foregoing pages contain a true and accurate transcript of my stenographic notes; that the opposing party was represented by counsel, Sebastian Hinton, Esq., during the taking of said testimony; that the said testimony was taken at 22 Fourth Avenue, New York City; and was commenced at 9.30 A. M. on the 10th day of February, 1921, and was concluded on the same day; that the deposition of said witness was read to or by said witness before he signed the same; and that I am not connected by blood or marriage with either of said parties or interested directly or indirectly in the matter in controversy.

In testimony whereof, I have hereunto set my hand and affixed my seal of office, at New York City, County of New York, State of New York, this 11th day of February, 1921.

AGATHA F. BRESLIN,
Notary Public.

(Seal.)

Bronx County, County Clerk's No. 88. Certificate filed in N. Y. County Clerk's No. 633.

Term expires March 30, 1921.